

4-1-1984

Informers Revisited: Government Surveillance of Domestic Political Organizations and the Fourth and First Amendments

Dolores A. Donovan
University of San Francisco

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Constitutional Law Commons](#), [Criminal Procedure Commons](#), and the [Privacy Law Commons](#)

Recommended Citation

Dolores A. Donovan, *Informers Revisited: Government Surveillance of Domestic Political Organizations and the Fourth and First Amendments*, 33 Buff. L. Rev. 333 (1984).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol33/iss2/3>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

Informers Revisited: Government Surveillance of Domestic Political Organizations and the Fourth and First Amendments

DOLORES A. DONOVAN*

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

—U.S. CONST. AMEND. IV

INTRODUCTION

IN this Orwellian year 1984, the debate over government surveillance of domestic political organizations has reached a new level of intensity. The controversy centers on the Federal Bureau of Investigation (FBI) guidelines implemented by Attorney General William French Smith in 1983.¹ Civil liberties groups and

* Professor of Law, University of San Francisco. A.B., Stanford University, 1967; J.D., Stanford University School of Law, 1970.

I thank Anthony Amsterdam, Barbara Babcock, and Stephanie Wildman for their comments on early drafts of this Article.

I also thank David Donner, University of San Francisco, class of 1984, for his assistance, which included more than just research. Many of his substantive suggestions have been incorporated into this Article.

1. W. SMITH, THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND DOMESTIC SECURITY/TERRORISM INVESTIGATIONS (1983) [hereinafter cited as SMITH GUIDELINES].

[A] national outcry [was] triggered by [the] announcement that the domestic security/terrorism guidelines for the Federal Bureau of Investigation were being loosened: U.S. District Court Judge Susan Getzendanner prohibited the implementation of portions of those guidelines within the city of Chicago. . . . Members of Congress were deluged with letters from alarmed constituents. The House of Representatives Committee on the Judiciary, in an unprecedented and bipartisan action, voted to delay the implementation of the new guidelines until January 1, 1984.

Edwards, *Too Much Power for the F.B.I.*, 3 CAL. LAW. 11 (1983) (Congressman Edwards is a member of the House of Representatives and the chair of the House Judiciary Committee's

Congressional opponents of the new guidelines claim that the guidelines endanger the exercise of first amendment freedoms by allowing the FBI to probe the activities of members of lawful domestic political organizations and to investigate persons engaged in the protected advocacy of political ideas.² These civil libertarians have expressed particular concern that the new guidelines, unlike the guidelines in force during past presidential administrations,³ permit the FBI to utilize very intrusive investigative techniques, such as infiltration of domestic political groups by means of informers, on the most minimal showing of possible future criminal activity.⁴ In response, the Attorney General contends that the privacy, speech, and assembly rights of citizens are adequately protected by the guidelines' requirement that, before opening an investigation, the FBI meet the threshold requirement of a "reasonable indication"⁵ that "two or more persons are in an enterprise for the purpose of furthering political or social goals wholly or in part through activities that involve force or violence and a violation of the criminal laws of the United States."⁶

Although those who side with the Attorney General and

Subcommittee on Civil and Constitutional Rights). H.R. 2670, 98th Cong., 1st Sess., 129 CONG. REC. 1591 (1983), which would have become the Department of Justice Authorization Act, would have delayed the implementation of the Smith Guidelines until January 1, 1984; however the bill did not reach the House floor. Hence, the Smith Guidelines are currently in operation.

2. See, e.g., Edwards, *supra* note 1, at 12: "[T]he FBI can investigate you if you advocate resistance to the draft, or spout Marxist slogans, or say you are against nuclear weapons and will blockade a missile factory." Among the civil liberties groups that have criticized the Smith Guidelines are the American Civil Liberties Union, the Campaign for Political Rights, and the National Committee Against Repressive Legislation. See, e.g., *Public Pressure Leads to Limits on New FBI Guidelines*, D.C. Memo, May/June 1983, at 4 (newsletter of the National Committee Against Repressive Legislation); *F.B.I. Given Broader "Domestic Security" Powers*, Organizing Notes, April/May 1983, at 3 (newsletter of the Campaign for Political Rights); *New FBI Guidelines—Illegitimate Intrusions Upon Constitutional Rights*, D.C. Memo, March/April 1983, at 1.

3. See, e.g., B. CIVILETTI, ATTORNEY GENERAL'S GUIDELINES ON FBI USE OF INFORMANTS AND CONFIDENTIAL SOURCES (1980); B. CIVILETTI, ATTORNEY GENERAL'S GUIDELINES ON FBI UNDERCOVER OPERATIONS (1980); Memorandum from Edward H. Levi, Attorney General, to Clarence M. Kelley, Director, FBI (Dec. 1976) (discussing use of informants).

4. See generally Edwards, *supra* note 1. See also the sources cited *supra* note 2.

5. See SMITH GUIDELINES, *supra* note 1, at 13-14 (requirement for "domestic security/terrorism" investigation).

6. Smith, *F.B.I. Guidelines: A Responsible Balance*, 3 CAL. LAW. 11, 75 (1983). Mr. Smith was the Attorney General of the United States at the time he wrote this article. "Preliminary inquiries" short of a full-blown "investigation" are authorized pursuant to a standard even lower than that of "reasonable indication." See SMITH GUIDELINES, *supra* note 1, at 4.

those who are allied with his critics disagree as to the amount of latitude which should be afforded to the FBI in its domestic political investigations, all are in accord with respect to certain fundamental principles: individual privacy interests are placed at risk by these government investigative techniques,⁷ and thus such government intrusions should be permitted only in compliance with an objective standard of possible criminality.⁸

The anomaly which provokes this Article is that this rare consensus between law enforcement and civil libertarians is wholly at odds with the current state of constitutional doctrine, as articulated through the Supreme Court's decisions, relating to government use of informers.⁹ Current fourth amendment law recognizes neither that legitimate individual privacy interests are at

7. "The first principle of the guidelines is that investigations are to be focused on violations of federal law with as little intrusion into the privacy of individuals as the needs of the situation permit." Smith, *supra* note 6, at 11. The Smith Guidelines provide that "[b]efore employing a technique, the FBI should consider whether the information could be obtained in a timely and effective way by less intrusive means. Some of the factors to be considered in judging intrusiveness are adverse consequences to an individual's privacy interests and avoidable damage to his reputation." SMITH GUIDELINES, *supra* note 1, at 16 ("Investigative Techniques") (emphasis added).

8. The Smith Guidelines themselves provide such threshold standards. See SMITH GUIDELINES, *supra* note 1, at 4 (preliminary inquiries authorized on the basis of "allegation or information indicating the possibility of criminal activity"), 7 ("general crimes investigations may be initiated . . . when facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed").

9. The term "informers" as used in this Article means persons who are paid by the federal government for information they provide in connection with the government's civil or criminal investigations of other persons. Thus defined, the term "informers" includes both undercover FBI agents and persons who are not FBI agents but who receive financial remuneration from the FBI for information provided. The latter category of paid informers includes both persons who were originally recruited by the FBI and persons who originally volunteered their services.

The purpose of defining an "informer" as one who receives financial remuneration is to provide law enforcement and the courts with a bright-line rule. The category of "informer" could just as easily be defined to exclude persons who originally volunteered their services to the government or to include persons who, though not receiving financial remuneration, receive intangible benefits such as shorter prison terms. The former approach (excluding those who originally volunteered) has the advantage of not holding the government responsible for what might be characterized as essentially passive, relatively non-intrusive behavior on its part. The latter approach (including persons motivated by a non-financial incentive) is perhaps more in tune with the reality of the government/informer relationship in issue. Serious questions exist as to whether informers who are under indictment, on parole, on probation, or who have past criminal convictions or are otherwise vulnerable to charges of criminal activity are properly categorized as volunteers. However, for the purposes of this Article, the line will be drawn at informers who receive financial compensation for information provided.

stake nor that it is desirable for law enforcers to conform to an objective standard of intervention before sending in informers.¹⁰ This incongruity is due, at the most fundamental level of analysis, to the fact that the Court's fourth amendment doctrine relating to informers is outdated. Viewed from a more procedural perspective, the gap may also result from the fact that the Court has not yet addressed the question of the constitutionality of government use of informers to infiltrate domestic political groups. The Court has not had the opportunity to examine the impact of first amendment values on its fourth amendment informer analysis.

Reconsideration of the informer cases is long overdue. The executive branch of the government has demonstrated its appreciation of this need, at least in situations implicating first amendment interests, by interposing an objective standard of proof of possible criminality between the individual citizen's privacy interest and government surveillance by means of informers. The legislative branch, by focusing on the nature of the proof required to meet that standard and the latitude to be allowed the FBI once the standard has been met, has acquiesced to the executive's decision to fashion the FBI guidelines in accord with the Court's modern fourth amendment opinions rather than in accord with the older informer cases.

This Article has two themes: that the Court's fourth amendment informer cases are out of line with modern fourth amendment analysis, and that where lawful domestic political groups are the subjects of government investigation, there is a danger of infringement of the first amendment rights of the citizen-members of those organizations.¹¹ Since government surveillance of political

10. See, e.g., *Hoffa v. United States*, 385 U.S. 293, 302 (1966) ("wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it" is not protected by the fourth amendment). In situations involving no protected privacy interest, the government is free to intrude at will. Cf. *infra* notes 16-17 and accompanying text.

11. *Discovery proceedings in Socialist Workers Party v. Attorney General*, 458 F. Supp. 895 (S.D.N.Y. 1978), *vacated sub. nom. In re Attorney Gen.*, 596 F.2d 58 (2d Cir.), *cert. denied sub. nom. Socialist Workers Party v. Attorney Gen.*, 444 U.S. 903 (1979), revealed how extensive the FBI's use of informers for political surveillance can be. Between 1960 and 1976, the FBI used 1331 informants to obtain information about the Socialist Workers Party and Young Socialist Alliance. 458 F. Supp. at 908. Of this group of informants, 300 were member informants and about 1000 were non-member informants. *Id.* "Approximately 55 FBI informants held offices or committee positions in the SWP and YSA between 1960 and 1976." Final Report of Special Master Charles D. Breitell at 25,

organizations not only implicates the fourth amendment but also may have a chilling effect upon the exercise of first amendment rights, the fourth amendment must be read more strictly than usual when domestic political surveillance is in issue.

This Article will demonstrate that the Court's fourth amendment informer cases are inconsistent with modern fourth amend-

Socialist Workers Party, 458 F. Supp. at 895 [hereinafter cited as Breitel Report]. "During the period 1960 to 1976, a total of three informants ran for elective office as SWP candidates; one ran for congressional office and two ran for state or local office." *Id.* at 27. It seems fair to surmise that most, if not all, of these informants were paid by the government for their services. *See generally id.* at 28-31 ("Payments to Informants").

Special Master Breitel made certain generalized "representative findings" concerning the use of informants by the FBI against the SWP and YSA:

4. The informants reported constantly on the names, addresses, telephone numbers, places and changes of employment, unemployment, marital or cohabitational status, marital strife, health, travel plans, and personal habits of SWP and YSA members. The FBI was made aware, through the efforts of the informants, of the identity of evidently every SWP or YSA member in each branch during the period there was an informant active in that branch. Active, "hard core", and leader SWP or YSA members were often identified as such. 5. Informants were encouraged to advance in the SWP and YSA by, among other things, cultivating and maintaining relationships with SWP and YSA leaders so as to develop sources of information and to be in a position to be considered for future leadership positions. . . . 8. The informants supplied the FBI repeatedly with (1) information concerning the personnel, finances and organizational strategy of the SWP and YSA; and (2) SWP literature given them as SWP or YSA members with the instruction that it was for members only.

Id. at 35-36.

Specific "representative findings" involving government informants' seizure of information and documents not otherwise generally available to the public are also found in the Breitel Report. *See id.* at 40-46.

The following government admissions are set forth in the Breitel Report: informers provided the FBI with information which the FBI utilized in anonymous letters, *id.* at 20; informers conveyed information to the FBI on the effects of FBI counter-intelligence programs, *id.*; informants who were members of the SWP and YSA generally provided to the FBI detailed reports describing the subject matter of every party meeting or activity the informant attended, *id.* at 22; informants reported to the FBI on the identities of all persons within the SWP or YSA with whom they came in contact, on the descriptions of their contacts including physical description, residence and marital status, *id.* at 22-23; the member informants generally provided the FBI with "copies of SWP and YSA documents, including mailing and membership lists, to which they had access by reason of their relationships with other members or their position within the organizations," *id.* at 23. Informants were generally utilized by the FBI pursuant to the instructions contained in § 87 of the FBI Manual of Instructions, *id.* at 21-22. Types of information sought by the FBI and hence by its informants pursuant to § 87 included the identity of the organizations' leaders and members, the size and composition of the organizations' membership, the sources of the organizations' funds and the nature of their expenditures, the organizations' connection with and infiltration of other groups, and other organizational activities. *Id.*

ment analysis because the leading cases¹² were decided prior to the seminal 1967 decision, *Katz v. United States*.¹³ *Katz* introduced into fourth amendment doctrine the concept of an "expectation of privacy"; specifically, it established that the validity of a search and seizure depends upon whether the government conduct in issue unreasonably invades the subject's reasonable or legitimate expectation of privacy.¹⁴ Although in 1971 the Court undertook, in light of *Katz*, a re-evaluation of government use of informers carrying electronic recording devices,¹⁵ the effort resulted in a plurality opinion focusing on the dangers posed by the technology of electronic surveillance rather than in an opinion focusing on the dangers posed by the government's use of informers. The Court has never taken a fresh, post-*Katz* look at the reasoning underlying its informer cases.

The Article also articulates, in light of the Court's recent cases, modern fourth amendment analysis and applies that analysis to the problem of government use of informers to infiltrate domestic political groups. A major concern to be addressed is whether the keystone concept of a legitimate expectation of privacy is to be measured against government intrusion or rather against intrusion by one's fellow citizens. To live with the knowledge that one's neighbor may eavesdrop is an experience different in kind and quality than to live with the knowledge that one's government secretly inserts its agents into one's personal and political affairs.

A short description of the structure of fourth amendment jurisprudence is necessary to explain the organization of this Article. To assert a government violation of the fourth amendment right against an unreasonable search and seizure, an individual must have had a legitimate expectation of privacy as to the place

12. See *Hoffa v. United States*, 385 U.S. 293 (1966); *Lopez v. United States*, 373 U.S. 427 (1963); *On Lee v. United States*, 343 U.S. 747 (1952).

13. 389 U.S. 347 (1967).

14. *Id.* at 360-61 (Harlan, J., concurring). In *Katz*, the Court held that the purpose of the fourth amendment was to protect people, not places. *Id.* at 353. This pronouncement signalled a shift away from notions of property law such as trespass and consensual entry as determinative of substantive fourth amendment rights. *Id.* But cf. *Rakas v. Illinois*, 439 U.S. 128 (1978). For a detailed discussion of the impact of property concepts on the Court's informer cases, see *infra* notes 159-222 and accompanying text.

15. *United States v. White*, 401 U.S. 745 (1971). *White* was cited approvingly in *United States v. Caceres*, 440 U.S. 741 (1979).

searched or items seized.¹⁶ Government conduct which violates a citizen's reasonable expectation of privacy is classified as a search or seizure.¹⁷ Searches and seizures are prohibited by the fourth amendment if they are unreasonable.¹⁸ A search conducted pursuant to a warrant issued on a finding of probable cause by a neutral and detached magistrate is presumed to be reasonable.¹⁹ A search conducted without a warrant is unreasonable unless certain exigent circumstances are present.²⁰ For example, where the government interest is very high, where the intrusion on individual privacy rights is minimal, and where the obtaining of a warrant would not be practicable, an objective standard amenable to post-search judicial review may be substituted for prior review by a neutral and detached magistrate.²¹ Examples of standards amenable to post-search judicial review are "probable cause,"²² "specific and articulable facts,"²³ and "reasonableness of the procedures followed [administrative regulations]."²⁴

When government infiltration of political organizations by means of informers is evaluated against the backdrop of the fourth amendment, two major questions emerge. The first is the threshold question of whether the government's use of informers to obtain information about the political beliefs, associations, and activities of its citizens violates those citizens' legitimate expectations of privacy. If the use is deemed to be not violative of such expectations, the analysis is concluded: the government conduct in issue is not subject to the strictures of the fourth amendment.²⁵ If, however, the use is deemed to be violative of the citizens' expecta-

16. See, e.g., *Rawlings v. Kentucky*, 448 U.S. 98, 105-07 (1980); *Rakas*, 439 U.S. at 144; *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968).

17. See *Smith v. Maryland*, 442 U.S. 735, 739-40 (1979); *Katz v. United States*, 389 U.S. 347 (1967).

18. U.S. CONST. amend. IV.

19. See, e.g., *United States v. United States District Court*, 407 U.S. 297 (1972) [hereinafter cited as *Keith*].

20. See *Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977).

21. See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Chambers v. Maroney*, 392 U.S. 42 (1970); *Terry v. Ohio*, 392 U.S. 1 (1968).

22. *Chambers*, 399 U.S. at 46.

23. *Terry*, 392 U.S. at 21.

24. *Martinez-Fuerte*, 428 U.S. at 562.

25. See, e.g., *Hoffa v. United States*, 385 U.S. 293 (1966). See also Y. KAMISAR, W. LAFAYE, J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 493-94 (5th ed. 1980).

tions of privacy, the question becomes whether issuance by a neutral and detached magistrate of a warrant based upon probable cause is required prior to any such infiltration by government informers, or whether some less rigorous standard, such as "reasonable suspicion"²⁶ or perhaps an even less demanding objective standard of proof, will suffice. Attorney General Smith has responded to that second question by implementing an objective standard of "reasonable indication."²⁷

This Article explores the threshold question described above: whether the government use of informers to investigate members of lawful domestic political groups violates those persons' legitimate expectations of privacy.²⁸ In making this inquiry, this Article is divided into five sections. Section I, "Models of Policy and Modes of Analysis," describes a working model of modern fourth amendment law.²⁹ Section II examines "The Nature of the Government Conduct" involved in domestic political surveillance by means of informers.³⁰ Section III, "The Nature of the Privacy Interest," explores the concept of legitimate expectations of privacy, proceeding both in terms of actual human interactions and in terms of normative considerations common to western democratic

26. The "reasonable suspicion" standard currently governs "stop and frisk" cases. See *Terry v. Ohio*, 392 U.S. 1 (1968).

27. SMITH GUIDELINES, *supra* note 1, at 13.

28. The fourth amendment rights of the organization itself are, arguably, also violated by such governmental conduct:

[T]he legal and social claims to privacy given to organizations by American society are more than a protection of the collective privacy rights of the members as individuals.

Organizational privacy is needed if groups are to play the role of independent and responsible agents that is assigned to them in democratic societies. Among these are the satisfaction of needs for affiliation in large-scale society; the expression of basic interests felt by subgroups in the community; the operation of civic enterprises by private rather than government management; criticism of government policies; and measurement of public sentiment on issues and policies between elections. Just as with individuals . . . organizations need the right to decide when and to what extent their acts and decisions should be made public.

A. WESTIN, *PRIVACY AND FREEDOM* 42 (1967). Where an organization is the target of a search and seizure, an individual member whose personal reasonable expectation of privacy was violated by the search and seizure in question has standing to object. See *Mancusi*, 392 U.S. at 364; Kuhns, *The Concept of Personal Aggrievement in Fourth Amendment Standing Cases*, 65 IOWA L. REV. 493 (1980).

29. See *infra* notes 34-94 and accompanying text.

30. See *infra* notes 95-103 and accompanying text.

societies.³¹ Section IV, "The Informer Cases Revisited: Assumption of Risk Theory," analyzes the Court's informer cases in terms of their historical context and in terms of the doctrine of assumption of risk.³² Section V surveys the few cases that have dealt with "The Convergence of the First and Fourth Amendments."³³

I. MODELS OF POLICY AND MODES OF ANALYSIS: THE MODERN FOURTH AMENDMENT

Professor Anthony Amsterdam has stated that "[f]or clarity and consistency, the law of the Fourth Amendment is not the Supreme Court's most successful product."³⁴ Expressions of frustration with the Court's fourth amendment work product range from Justice Frankfurter's celebrated understatement, "[t]he course of true law pertaining to searches and seizures . . . has not . . . run smooth,"³⁵ to Professor Dworkin's overstatement, "[t]he Fourth Amendment cases are a mess!"³⁶ Before taking up a fourth amendment issue of first impression such as that of government surveillance of political organizations by means of informers, it is necessary to step back and attempt to discern whether any models of policy or broad outlines of form are available to provide a framework for analysis.³⁷

In 1974, Amsterdam posited as a central tension in fourth amendment jurisprudence the question of "whether the amendment should be viewed as a collection of protections of atomistic spheres of interest of individual citizens or as a regulation of governmental conduct."³⁸ From Amsterdam's atomistic perspective,

31. See *infra* notes 104-58 and accompanying text.

32. See *infra* notes 159-222 and accompanying text.

33. See *infra* notes 223-58 and accompanying text.

34. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 349 (1974).

35. *Chapman v. United States*, 365 U.S. 610, 618 (1961) (concurring opinion).

36. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329 (1973).

37. The issues involved in the debate over the exclusionary rule provide a model of policy which is capable of serving as a vehicle for analysis of recent fourth amendment jurisprudence. However, the analytic limitations inherent in using a debate on the merits of a remedy as a vehicle for an understanding of substantive constitutional rights have lead this author to reject that approach. See generally Williamson, *Fourth Amendment Standing and Expectations of Privacy: Rakas v. Illinois and New Directions for Some Old Concepts*, 31 U. FLA. L. REV. 831, 865-67 (1979).

38. Amsterdam, *supra* note 34, at 367. For a hypothetical case illustrating the distinc-

the fourth amendment provides protections "[that] safeguard *my* person and *your* house and *her* papers and *his* effects"³⁹ From Amsterdam's regulatory perspective, the amendment is viewed as "essentially a regulatory canon requiring government to order its law enforcement procedures in a fashion that keeps us collectively secure in our persons, houses, papers and effects, against unreasonable searches and seizures"⁴⁰ These two opposing perspectives on the fourth amendment have, in the years since publication of Amsterdam's article, provided a most helpful framework for analysis of the Court's fourth amendment work product and one which has often been utilized by commentators.⁴¹ The atomistic and regulatory perspectives in fact provide the framework within which the models of the fourth amendment proposed in this Article are built.

In the decade since Amsterdam's article originally appeared, however, "expectation of privacy" analysis has moved to a central position in the Court's decisions dealing with the scope of the fourth amendment's coverage.⁴² Since the concept of an expectation of privacy is so heavily imbued with the particularistic overtones characteristic of Amsterdam's atomistic perspective, and since the regulatory perspective does not recognize expectations

tion, see *id.* at 368. For a discussion of whether this distinction between perspectives on the amendment can affect real-life outcomes or whether it merely reflects the specificity or generality with which a court rationalizes its holdings, see Kuhns, *supra* note 28, at 496.

39. Amsterdam, *supra* note 34, at 367 (emphasis supplied). The atomistic model has historically dominated the area of "standing," which emphasizes that fourth amendment rights are "personal rights which . . . may not be vicariously asserted." *Id.* See also *Rakas*, 439 U.S. at 133-34; *Alderman v. United States*, 394 U.S. 165, 174 (1969).

40. Amsterdam, *supra* note 34, at 367. Opinions endorsing the regulatory model of the amendment are most often seen where the exclusionary rule is at issue. See, e.g., *United States v. Calandra*, 414 U.S. 338, 347 (1974); *Mapp v. Ohio*, 367 U.S. 643 (1961). See also Kuhns, *supra* note 28, at 499-500.

41. E.g., Kuhns, *supra* note 28, at 349.

42. For cases involving scope-of-coverage issues, compare *Katz v. United States*, 389 U.S. 347 (1967) (electronic eavesdropping by government on person conversing by telephone in public phone booth "violated the privacy upon which he justifiably relied"), with *Smith v. Maryland*, 442 U.S. 735 (1979) (the individual has no reasonable expectation of privacy as to the list of telephone numbers that he dials from his home telephone). In 1978, the Court established that cases formerly viewed as involving standing to invoke fourth amendment protection were subsumed under the "scope of coverage" formula. See *Rakas*, 439 U.S. at 128. The question of whether government surveillance of domestic political groups by means of informers falls within the ambit of fourth amendment protection is a question of the scope of coverage of the amendment.

of privacy as tools for the resolution of scope questions,⁴³ an attempt to explain the Court's opinions⁴⁴ in terms of an atomistic-regulatory polarity would miss the mark.

A new polarity, one which acknowledges the centrality of expectations-of-privacy analysis to the Court's recent decisions, is needed to describe more accurately the present policy conflicts concerning the scope of coverage of the amendment. The competing visions of the fourth amendment revealed in the Court's scope-of-coverage cases of recent years⁴⁵ are more accurately depicted by use of a "public interest" model and a "private interest" model of the fourth amendment.⁴⁶ These models are alike in that each views the amendment as designed to protect the privacy interests of individual citizens. The models are, however, different in their approach to the problem of protecting these privacy interests. The private-interest model of the fourth amendment is an essentially static construct which interprets the amendment as being primarily concerned with whether a particular asserted privacy right falls within the defined scope of its protection.⁴⁷ Under the private-interest model, the Court concerns itself only with the individual privacy rights of the individual defendant.⁴⁸ The pub-

43. Although Amsterdam's regulatory perspective does not take cognizance of expectations-of-privacy analysis as a tool for resolving "scope" questions, his regulatory perspective does not wholly exclude consideration of privacy interests. The regulatory perspective emphasizes that one of the functions of the amendment is to preserve the freedom and privacy of citizens as a whole. Amsterdam, *supra* note 34, at 403.

44. *E.g., Smith*, 442 U.S. at 735; *Rakas*, 439 U.S. at 128.

45. Compare *Katz v. United States*, 389 U.S. at 347 (person in glass-enclosed public telephone booth had legitimate expectation of privacy in the contents of his communications) with *Rakas*, 439 U.S. at 128 (passenger in automobile searched by police had no legitimate expectation of privacy in the interior of the automobile).

46. The names of the models are descriptive of their analytic emphasis. See *infra* notes 48-50 and accompanying text.

47. See *infra* notes 134-44 and accompanying text. The private interest view focuses on the need for protection of existing personal rights and property rights:

Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society [O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy

Rakas, 439 U.S. at 144 n.12.

48. The "private interest" view of the fourth amendment is similar to Amsterdam's atomistic perspective. The major analytic distinctions between the two approaches are due to the fact that Amsterdam's atomistic perspective was formulated prior to the ascendancy of "legitimate expectations of privacy" as arbiters of the scope of coverage of the fourth amendment. The case of *Rakas v. Illinois*, 439 U.S. 128 (1978), inaugurated the legitimate-

lic-interest model is a more dynamic construct which treats the amendment as mediating between the need for protection of individual privacy rights and the need for effective government action for the maintenance of social order.⁴⁹ Under the public-interest model, the Court reasons from the individual privacy rights of the individual defendant to the collective privacy rights of citizens at large, and from there to the interests of the body politic.⁵⁰

Models of policy generate modes of analysis, just as substance sometimes generates form.⁵¹ The analyses generated by the public-interest and private-interest models of the fourth amendment are distinguishable from each other in three major respects. First and foremost, a public-interest analysis has two focal points—privacy and government conduct⁵²—while a private-interest analysis has only one focal point—privacy.⁵³ The public-interest inquiry is whether the public's privacy interest against this type of government conduct is one which the fourth amendment was designed to implement. The private-interest inquiry is whether this interest is of a type the fourth amendment was designed to protect.

expectations-of-privacy era by subsuming questions of standing to the substantive query of whether a person's legitimate expectation of privacy had been violated. For an example of a case in which the Court limits itself to consideration of the individual rights of defendants, see, *e.g.*, *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

49. The normative considerations implicit in the public-interest model of the fourth amendment are much the same as those implicit in Justice Jackson's view of the Bill of Rights generally: to place "the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself." *Watts v. Indiana*, 338 U.S. 49, 61 (1949) (Jackson, J., concurring).

50. The initial focus of the Court must, however, be upon the expectation of privacy of the individual defendant. This point is perhaps best made by a comparison of Amsterdam's regulatory perspective with the public-interest model. The focus of the regulatory perspective is primarily on the nature of the government conduct in issue. The regulatory inquiry is: Is this government conduct of the type which the fourth amendment is designed to prohibit? The regulatory perspective does not deal in terms of particularized expectations of privacy. The public-interest model, however, focuses both on government conduct and on privacy, incorporating the concept of expectations of privacy into its analysis.

51. See generally Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

52. Compare *Katz*, 389 U.S. at 352, with *Smith*, 442 U.S. at 735.

53. See *Rawlings*, 448 U.S. at 98 (defendant who placed illegal drugs in his companion's purse shortly before the arrival of the police on the scene had no reasonable expectation of privacy as to the interior of the purse and hence had no standing to object to the search); *Rakas*, 439 U.S. at 128 (passengers with no possessory interest in the automobile searched had no reasonable expectation of privacy as to the interior of the automobile and hence no standing to object to the search).

A second way in which the two modes of analysis are distinguishable is that while public-interest analysis evaluates privacy interests as being held against the government, a private-interest analysis treats privacy interests as conceptually isolated from considerations of the nature of the government conduct in the case. Although it is obvious that the purpose of the fourth amendment is to protect citizens from unreasonable action by the government, not from unreasonable action by one another,⁵⁴ the Court has ceased to assume that the privacy interests of citizens are necessarily to be evaluated as being held against the government.⁵⁵ The tendency in recent decisions is to evaluate privacy interests as being held against one's acquaintances or against the general public.⁵⁶ This tendency is manifest in recent private-interest cases in which the Court has viewed the amendment as a particularistic protector of personal property rights.⁵⁷

A third point of distinction is the breadth of the analysis employed in evaluating privacy interests: a public-interest mode

54. The notion that an individual's fourth amendment privacy expectation is to be evaluated as against intrusion by the government rather than as against intrusion by his or her fellow citizens is implicit in *Katz*. "[The Fourth] Amendment protects individual privacy against certain kinds of government intrusions" *Katz*, 389 U.S. at 350. *Accord*, *Mancusi v. DeForte*, 392 U.S. 364, 369-70 (1968). For a discussion of the nature of privacy, see *infra* notes 95-158 and accompanying text.

The same notion is implicit in the fourth amendment itself. Commenting on *Katz*, Professor Amsterdam wrote:

The ultimate question, plainly, is a value judgement. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society. That, in outright terms, is the judgment lurking under the Supreme Court's decision in *Katz*, and it seems to me the judgment that the fourth amendment inexorably requires the Court to make.

Amsterdam, *supra* note 34, at 403.

55. *E.g.*, *United States v. Miller*, 425 U.S. 435 (1976) (a citizen who voluntarily reveals financial information to his or her bank no longer has a legitimate expectation of privacy in the substance of that information and hence cannot object to its warrantless seizure by the government). For further discussion of the "assumption of risk" reasoning adopted in the *Miller* case, see *infra* notes 159-222 and accompanying text.

56. See *Rawlings*, 448 U.S. at 98 (boyfriend had no legitimate expectation of privacy in the purse of his girlfriend of a few days; boyfriend had placed drugs in purse upon hearing the police at the door); *Rakas*, 439 U.S. at 128 (passenger in automobile had no legitimate expectation of privacy in the passenger compartment of the car because he did not have complete dominion and control over the automobile; he neither owned nor leased the car).

57. Compare *Jones v. United States*, 362 U.S. 257 (1960) (overruled by *United States v. Salvucci*, 448 U.S. 83 (1980)) with *Rawlings*, 448 U.S. at 98, and *Rakas*, 439 U.S. at 128.

utilizes an analysis which is extremely broad in scope, while a private-interest mode tends towards more particularistic approaches. A broad analysis examines the impact of certain government conduct on the collective privacy expectations of citizens generally.⁵⁸ A narrow analysis focuses on the individual privacy expectations of the individual defendant.⁵⁹

To summarize, a public-interest analysis has two elements. First, the nature of the government conduct, in the context of its impact (if any) on the individual citizen objecting, is examined.⁶⁰

58. See, e.g., *Katz*, 389 U.S. at 352. "A person in a telephone booth may rely upon the protection of the Fourth Amendment. . . . To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."

59. See, e.g., *Rawlings*, 448 U.S. at 104-05 (defendant who had placed his drugs in his girlfriend's purse had no legitimate expectation of privacy in her purse since he had known her only a few days and had never before used her purse as a resting place for his possessions, and since a long-time companion of the woman in question also had access to her purse).

60. See *Smith v. Maryland*, 442 U.S. 735, 741 (1979) ("[i]n applying the *Katz* analysis to this case, it is important to begin by specifying precisely the nature of the state activity that is challenged"). There seems to be no reason why the privacy interest should precede the government conduct, or vice versa, so long as each element is examined in the context of the other.

The real question is why the government conduct should be examined at all. There are two possible answers. The first has to do with the language of the amendment itself. The amendment specifies that there shall be no unreasonable "searches and seizures." The amendment does not say that there shall be no unreasonable "government action." It is, therefore, necessary to examine the government conduct in issue to determine whether that conduct is a "search and seizure." The amendment also specifies that "the people [shall] be secure in their persons, houses, papers, and effects" against the aforementioned government conduct which constitutes a "search and seizure." It is, therefore, necessary to examine the impact of the conduct on the individual citizens to determine whether the government conduct bears the necessary relationship to the "persons, houses, papers, and effects" in question. See *Amsterdam*, *supra* note 34, at 356.

The second reason to examine the government conduct and its impact on the individual citizen has to do with "assumption of risk" theory. One of the defining characteristics of risk analysis is the supposition that the government conduct in issue has no perceptible effect upon the individual citizen involved. Since the absence of an effect is assumed, the outcome of the second element of the fourth amendment equation is predetermined: government action which had no impact on a defendant cannot, *ipso facto*, have violated the defendant's legitimate expectation of privacy. For example, where defendant has already shared his financial information with his bank, the government's accession to that same financial information can have no additional impact or effect on defendant. See *United States v. Miller*, 425 U.S. 435 (1976). An analysis in the public-interest mode would not assume the absence of effect in the *Miller* situation, but would rather question whether the government conduct of seizing that financial information had an incremental impact upon defendant. The answer might well be that there had been no impact, but at least the issue will have been confronted rather than avoided.

Assuming that the government conduct in question has had some impact, however min-

Second, the nature of the citizen's privacy expectation, evaluated as against the government, is examined in the light of the particular government conduct.⁶¹ The privacy interests and expectations of the general public, not just those of the individual who is objecting to the government conduct, are taken into consideration.⁶² In determining what those interests, if any, are, and whether those interests are justifiable, the nature of the government conduct is a factor to be considered. Privacy interests are not viewed as existing in a vacuum; rather, they are viewed as existing in the social context of, or as against, the particular government conduct in issue.⁶³

In contrast, private-interest analysis has only one element: examination of an asserted privacy interest.⁶⁴ The focus is on the particular defendant and his or her particularized factual relationship to the premises searched or items seized. The scope of the inquiry is narrow; no attempt is made to extrapolate beyond the facts of the case at bar to a class of similar fact patterns. Privacy interests are viewed as existing in a vacuum, the boundaries of which are determined by property law concepts⁶⁵ or by the particularized facts of the case at bar.⁶⁶ The nature of the government

imal, upon the citizen subjectively, the next question is whether that impact infringes upon the citizen's "right . . . to be secure." U.S. CONST. amend. IV. Many forms of government conduct affect citizens; the question is whether the particular impact infringes upon a person's "right . . . to be secure" within the meaning of the fourth amendment. *Id.* It is to that question that the second element of the public-interest analysis is addressed.

For a more thorough analysis of the assumption-of-risk approach, see *infra* notes 159-222 and accompanying text.

61. See, e.g., *Katz*, 389 U.S. at 352.

62. *Id.* See *supra* note 58.

63. *Id.* In certain public-interest cases it may be appropriate to engage in a normative inquiry as to the nature of the restraints on government action required for the maintenance of a free and open society. See *Smith*, 442 U.S. 735, 740-41 n.5. See *infra* notes 144-58 and accompanying text.

64. The examination of the asserted privacy interest may, of course, be conducted from more than one perspective. Mr. Justice Powell has suggested four possible perspectives: (1) a determination as to whether precautions to maintain privacy were taken; (2) a determination of the way in which a location has been used; (3) an historical determination as to whether the asserted privacy interest has ever been recognized; and (4) a determination as to whether the asserted privacy interest arises as a concomitant to established property rights. *Rakas*, 439 U.S. at 152-53 (concurring opinion).

65. Cf. *Rakas*, 439 U.S. at 148 ("[j]udged by the foregoing analysis, petitioners' claims must fail; [t]hey asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized").

66. Cf. *Rawlings*, 448 U.S. at 105-06.

conduct in the case is not an element in the privacy equation.

The next question is to what sort of case is each of these analyses appropriate.⁶⁷ This Article contends that each of these modes of analysis fits, in the sense of being peculiarly suited to, the fact patterns and issues presented by a certain sort of case. It would, of course, be possible to apply one or the other uniformly to all of the scope-of-coverage cases. However, the image of square pegs in round holes is as compelling in law as in any other field. There is, when all is said and done, a logical relationship between facts, issue(s), reasoning, and conclusion.⁶⁸

There are two sorts of fact patterns which raise issues concerning the scope of the fourth amendment's coverage. In the first category, there is no question that the government conduct in issue invaded *someone's* personal fourth amendment rights; rather, the issue is whether the individual objecting to the government conduct is the person whose fourth amendment rights were

67. The word "appropriate" is intended to be used in its descriptive sense rather than in its normative sense.

68. The structural differences between the Court's opinion in *Rakas*, 439 U.S. at 128, and its opinion in *Smith*, 442 U.S. at 735, handed down one year later, constitute an acknowledgment, *sub silentio*, of the need for different modes of analysis for different sorts of fact patterns in the "scope of coverage" area. *Rakas* concerned itself solely with the question of whether the petitioner's legitimate expectation of privacy had been violated. *Smith* concerned itself with two questions: the nature of the government activity and the legitimacy of petitioner's expectation of privacy. The *Rakas* conclusion that "standing . . . is more properly subsumed under substantive Fourth Amendment doctrine," 439 U.S. at 139, does not preclude the use of a two-pronged analysis in appropriate scope-of-coverage cases.

It should be emphasized that nothing we say here casts the least doubt on cases which recognize that, as a general proposition, the issue of standing involves two inquiries: first, whether the proponent of a particular legal right has alleged "injury in fact," and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties.

Rakas, 439 U.S. at 139. See also Williamson, *supra* note 37, at 845-56.

Williamson suggests that "two separate but related concepts" are subsumed under the Court's concept of "expectations of privacy," both of which "are implicated in the attempt to define the fourth amendment's scope." *Id.* at 845. First, there is the concept that even if an invasion of privacy has taken place an inquiry must be made as to whether the person objecting to the invasion has the "capacity . . . to assert the claim." *Id.* "The second concept . . . involves the determination of whether the challenged activity constituted an invasion of privacy, *i.e.*, a search." *Id.* at 846. The present classification of the two types of cases subsumed under the notion of scope is influenced both by Williamson's analysis, and by Kuhns' analysis of the "standing" cases in terms of the concept of "personal aggrievement." See generally Kuhns, *supra* note 28.

violated. One fact pattern falling into this category would involve a warrantless search of a home in the absence of any exigency and a seizure, inside the home, of narcotics subsequently introduced at trial against a dinner guest of the homeowner falls into this first category. The government conduct is an unreasonable search and seizure under the fourth amendment and clearly invaded the homeowner's personal fourth amendment rights. The issue is whether the dinner guest who is complaining stands in such a relation to the unreasonable search and seizure that he or she has also been personally aggrieved within the meaning of the fourth amendment. Because the nature of the government conduct is not in question, the private-interest mode of analysis is suitable to this sort of case. *Rakas v. Illinois*⁶⁹ was the first of these modern private-interest cases.⁷⁰ *Rakas* falls into the class of cases traditionally described as involving the issue of fourth amendment "standing."⁷¹

In the second type of case the issue is whether the nature of the government conduct is such as to intrude upon a citizen's legitimate expectation of privacy. In these cases, there is no question that *if* any rights have been violated, they are rights which are personal to the complaining individual. Government use of a new technological device, such as a satellite, to take photographs of a person in the backyard of his or her home falls into this second category of fact pattern, assuming the photographs are introduced against the homeowner at trial. It is clear that, if the government conduct has violated the privacy rights of anyone at all, that conduct has violated the personal privacy rights of the homeowner—the question is whether government use of a satellite to photograph citizens in the backyards of their homes can violate *any* person's legitimate expectation of privacy. Because both pri-

69. 439 U.S. 128 (1978).

70. In *Rakas*, the government searched a vehicle driven by its owner. Petitioners were passengers in the automobile. Incriminating evidence was seized and introduced against the petitioners at trial. The Court granted certiorari only on the question of petitioners' standing to challenge the vehicular search and expressly disavowed any interest in the question of probable cause to search the automobile. 439 U.S. at 130. Thus, the nature of the government conduct (the vehicle search) was not in question. The facts before the Court did not raise the issue of the propriety of the government conduct, and hence private-interest analysis was suitable.

71. E.g., *Alderman v. United States*, 394 U.S. 165, 174 (1969); *Jones v. United States*, 362 U.S. 257 (1960) (overruled by *United States v. Salvucci*, 448 U.S. 83 (1980)).

vacy interests and the nature of the government conduct are in issue, the public-interest mode, with its dual, interdependent focus and breadth of analysis, is suitable to this sort of case.⁷² *Katz v. United States*⁷³ is the paradigmatic public-interest case. *Katz* falls into the class of cases traditionally described as involving fourth amendment "scope of coverage" rather than "standing."⁷⁴

The case of *Smith v. Maryland*⁷⁵ provides a vehicle for a more complete understanding of the use, as tools of analysis, of the respective models. Although application of the models to the *Smith* case reveals the analytic pitfalls attendant upon a failure to recognize the two types of fact patterns and the consequent failure to apply the appropriate mode of analysis, the following discussion of *Smith* is intended not so much as a criticism of that case but rather as an exercise in the use of the models of fourth amendment policy set forth in this Article.⁷⁶ The discussion of *Smith* is a preview of the analytic process necessary to resolution of the problem of government surveillance of domestic political groups by means of informers.

72. See generally *Keith*, 407 U.S. 297, 312-13 (1972); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Holmes v. Burr*, 486 F.2d 55, 63-66 (9th Cir.) (Hufstedler, J., dissenting), cert. denied, 414 U.S. 1116 (1973).

73. 389 U.S. 347 (1967).

74. There may, of course, be cases whose fact patterns raise both issues. The first issue would be whether the nature of the government conduct was such as to violate a citizen's legitimate expectation of privacy (the public-interest approach). The second issue would be whether the expectation of privacy in question was personal as to the claimant (the private-interest approach).

75. 442 U.S. 735 (1979).

76. Fairness compels recognition of the fact that the Court, unlike the commentators, operates subject to the constraints of a committee and must pay the price, as well as reap the benefits, of such a system:

The wise joke that defines a camel as a horse drafted by a committee only begins to describe that price. Insofar as the Court observes—for excellent reasons—"series of rules under which it has avoided passing upon a large part of all the constitutional questions pressing upon it for decision," and particularly the rule against deciding "constitutional issues on a broader basis than the record imperatively requires," the Court is in the unenviable position of a committee attempting to draft a horse by placing very short lines on a very large drawing board at irregular intervals during which the membership of the committee constantly changes.

Amsterdam, *supra* note 34, at 350. On the other hand: "Examination of prior Supreme Court decisions interpreting the phrase [expectations of privacy] reveals that failure to recognize the distinction between the two lines of inquiry is a potential source of confusion. . . . Clarity, therefore, demands specific identification of the particular issue presented; capacity or invasion of privacy." Williamson, *supra* note 37, at 846.

In *Smith*, the government asked a telephone company to attach a pen register to the telephone line of petitioner, a suspect in a criminal case.⁷⁷ The telephone company installed a pen register at its central office; the pen register recorded the numbers dialed from the petitioner's home telephone.⁷⁸ The government introduced the list of telephone numbers into evidence at petitioner's subsequent robbery trial; petitioner's motion to suppress was denied by the trial court.⁷⁹ The fact pattern thus falls into the second category of scope cases: if any fourth amendment rights at all have been violated, those rights are personal to the petitioner to whose phone line the pen register was attached. A court must, therefore, consider whether the nature of the government conduct of causing the telephone numbers dialed from petitioner's home telephone to be recorded was such as to violate petitioner's legitimate expectation of privacy. In other words, "this case presents the question whether the installation and use of a pen register constitutes a 'search' within the meaning of the Fourth Amendment" ⁸⁰

Since *Smith* falls into the genre of scope cases focusing upon whether government conduct has violated privacy rights, the public-interest model is appropriate. In accord with this view, the majority opinion opens with a discussion of *Katz*⁸¹ and then moves on to an investigation of the nature of the government conduct. "In applying the *Katz* analysis to this case, it is important to begin by specifying precisely the nature of the state activity that is chal-

77. *Smith*, 442 U.S. at 737.

78. *Id.*

79. *Id.*

80. *Id.* at 736.

81. The discussion of *Katz*, however, falls into the error of confusing the particularistic, conceptually isolationist, private-interest perspective with the generalized, contextual, public-interest perspective. The Court in *Katz* wrote: "[The Fourth] Amendment protects individual privacy against certain kinds of government intrusion" 389 U.S. at 350. The fourth amendment privacy concept enunciated in *Katz* is a dynamic one of privacy interacting with government intrusion. The Court in *Smith* wrote: "Consistently with *Katz* . . . the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable' . . . expectation of privacy *that has been invaded* by government action." 442 U.S. at 740 (emphasis supplied).

The fourth amendment privacy concept enunciated in *Smith* is static. It envisions an isolated zone of personal interest existing apart from and unconnected to public expectations concerning appropriate government conduct. The government conduct does not become a relevant element in the analysis until after the claimant has borne the burden of establishing his or her personal zone of privacy rights.

lenged.”⁸² The Court describes the government’s conduct as installing a pen register on the phone company’s premises.⁸³ However, there is no direct statement that the government, by means of installation of the pen register, obtained a record of the numbers that petitioner dialed on his home telephone. Rather, the government’s conduct is described in such a way as to create the impression that it occurred in a universe having nothing to do with the petitioner. “The activity here took the form of installing and using a pen register. Since the pen register was installed on telephone company property at the telephone company’s central offices, petitioner obviously cannot claim that his ‘property’ was invaded or that police intruded into a constitutionally protected area.”⁸⁴

The *Smith* decision then focuses upon a determination as to whether the petitioner had “a ‘legitimate expectation of privacy’ regarding the numbers he dialed on his phone.”⁸⁵ The Court found that “[t]his claim must be rejected,”⁸⁶ for “[a]ll telephone users realize that they must ‘convey’ phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed.”⁸⁷ Once the information has been revealed to the telephone company, one can have no further legitimate privacy interest in it.⁸⁸

In one sense, public-interest analysis was adopted in *Smith*. The Court’s reasoning process gave analytic weight to the nature of the government conduct and considered the expectations of all telephone subscribers, not just those of petitioner,⁸⁹ in determining what the privacy interests involved were. In another sense, however, it is the private-interest model which has dominated the Court’s analysis. A primary characteristic of the private-interest mode of analysis is that it deals with privacy interests in a vacuum isolated from consideration of the nature of the government conduct involved. By considering the nature of the privacy interest in

82. *Smith*, 442 U.S. at 741.

83. *Id.*

84. *Id.*

85. *Id.* at 742.

86. *Id.*

87. *Id.*

88. *Id.* at 743-44. For a discussion of assumption-of-risk theory, see *infra* notes 159-222 and accompanying text.

89. 442 U.S. at 741-42.

Smith as though it existed in a vacuum having nothing to do with the government, and by treating the government conduct as though it, too, existed in a vacuum having nothing to do with the public's privacy expectations, the Court ducked the hard questions. Nowhere did the Court consider the nature of government conduct in the context of the public's privacy expectations as against the government. Rather, the Court has analyzed the public's privacy expectations only as against the telephone company.

The important questions remain unanswered. Do the members of the general public expect that the government will keep records of all telephone calls made from their home telephones? Does the public's lack of expectation of privacy as against the telephone company logically entail that the public has no expectation of privacy as against the government?⁹⁰

The fourth amendment was enacted to protect the citizenry from the government, not to protect the citizenry from each other. Surely, where the issue is whether government conduct violates privacy rights, the question of the nature of the government conduct and the question of the nature of the privacy rights are indissolubly linked.

The foregoing analysis can be applied to the problem of government surveillance of members of lawful political organizations by means of informers.⁹¹ Typically, the government pays individuals to join an organization, overhear and participate in conversations among the members of the organization,⁹² and report on the contents of the conversations to his or her superiors in the FBI. When a person whose conversations have been reported to the FBI objects to the government conduct, the fact pattern will fall into the second category of scope-of-coverage cases: in such a sit-

90. For detailed discussion of the factual and legal premises of *Smith*, see Fishman, *Pen Registers and Privacy: Risks, Expectations, and the Nullification of Congressional Intent*, 29 CATH. U.L. REV. 557 (1980).

91. For a definition of the term "informer" as used herein, see *supra* note 9.

92. Presumably most such conversations take place in constitutionally protected places such as offices, see *Mancusi v. DeForte*, 392 U.S. 364 (1968), or homes, see *Payton v. New York*, 445 U.S. 573 (1980). Arguably, the government conduct is doubly an invasion of privacy where the informer utilizes information gained in such a conversation to seize evidence in a protected home or office. See *Baldwin v. United States*, 450 U.S. 1045 (1981) (Marshall, J., dissenting from denial of certiorari). However, the analysis in this Article will proceed on the assumption that the nature of the government conduct is the same whether it occurs in a public street, an office, or a home. The core conduct consists of seizure of the "contents of conversations."

uation, if any fourth amendment rights have been violated, those rights are personal to the individual, and the only issue is whether the government conduct violated his or her legitimate privacy interests. Since the situation involves both government conduct and privacy interests, rather than privacy interests alone, public-interest analysis is appropriate.

Any public-interest analysis must focus first on the nature of the government conduct challenged,⁹³ in the context of its impact on the individual objecting.⁹⁴ The focus must then shift to an examination of the asserted privacy expectations as against the government conduct in question.

II. THE NATURE OF THE GOVERNMENT CONDUCT

"[I]t is important to begin by specifying precisely the nature of the state activity that is challenged."⁹⁵ Government use of informers involves three elements: (1) the aggressive introduction of the paid informer into the life of a citizen; (2) by means of deceit; coupled with (3) the seizing of the contents of communications.

This skeletal outline can be fleshed out by reference to past instances of government surveillance of political organizations.⁹⁶

93. *Smith*, 442 U.S. at 741.

94. *Cf. Katz*, 389 U.S. at 347.

95. *Smith*, 442 U.S. at 741.

96. *E.g.*, *Socialist Workers Party v. Attorney Gen.*, 458 F. Supp. 895 (S.D.N.Y. 1978), *vacated sub. nom. In re Attorney Gen.*, 596 F.2d 58 (2d Cir.), *cert. denied sub. nom. Socialist Workers Party v. Attorney Gen.*, 444 U.S. 903 (1979).

The prototypical fact pattern is structured so as to eliminate from discussion two related issues. The first issue has to do with the fact that when conversations from which the informer gleans information occur in the offices of the organization or in the homes and offices of individual members, the fourth amendment is doubly implicated. The threshold issue arises when the government agent intrudes into a constitutionally protected area. *See Baldwin*, 450 U.S. at 1045. *Compare Payton v. New York*, 445 U.S. 573 (1980) (home is protected area) and *Mancusi v. DeForte*, 392 U.S. 268 (1967) (union office is a protected area) with *Hoffa v. United States*, 385 U.S. 298, 302 (1966) (the location of a conversation with an informant is not controlling) (*dictum*). When the government informer who has intruded into a constitutionally protected area then seizes the contents of communications while in that area, the fourth amendment has, arguably, been twice offended.

The second issue concerns the seizure of documents or other objects by an informer. Government informers who have infiltrated political groups have in past cases seized documents not available to the general public and conveyed those documents to their superiors in the FBI. *See Breitel Report, supra* note 11, at 23, 36, 40-46. The surreptitious seizure of documents by informers has been found to be unlawful. *Gouled v. United States*, 255 U.S. 298 (1921). *See also Baldwin v. United States*, 450 U.S. 1045 (1981) (Marshall, J., dissenting from denial of certiorari); *Lewis v. United States*, 385 U.S. 206, 211 (1966); *Hoffa*, 385

In the worst-case scenario, informers have not only joined organizations but have also become active in the organizations, to the point of holding office or committee positions.⁹⁷ Informers have been encouraged by their superiors at the FBI to advance in political organizations by cultivating and maintaining relationships with the organizational leaders so as to develop sources of information and, possibly, to be considered for future leadership positions.⁹⁸ The FBI has placed informers in political organizations to split the organizational structure and foment discord.⁹⁹

It appears that in some cases informants directly participated in the carrying out of the disruption activities. In other instances the informants furnished the FBI with information which enabled regular agents of the FBI to conduct the disruption activities. The observations of the informants assisted the FBI in assessing the success or failure of disruption activities.¹⁰⁰

The information obtained by informers and then conveyed to the FBI has been broad. Such information has concerned the membership lists, personnel, finances, and organizational strategy¹⁰¹ of the targeted political organization. Informers have provided the FBI with detailed reports describing the subject matter of every organizational meeting or activity that the informers have attended.¹⁰² Information provided as to individual members has ranged from characterization of political beliefs as "active," "hard core," or "leader" to information concerning "co-habitational status, marital strife, health, travel plans, and personal habits . . ."¹⁰³ None of the foregoing types of information is of the sort generally available to the public, let alone to the government.

The nature of the government conduct, then, is to insert informers into domestic political organizations for the purpose of monitoring the activities of members of those organizations and also, in past cases at least, to disrupt those activities. The precise

U.S. at 303; *Lopez v. United States*, 373 U.S. 427, 438 (1963).

97. Approximately 55 FBI informants held offices or committee positions in the Socialist Workers Party and the Young Socialist Alliance between 1960 and 1976. Breitel Report, *supra* note 11, at 25. During the same period, three informers ran for public office as Socialist Workers Party candidates; one ran for Congress and two ran for state and local office. *Id.* at 27.

98. *See id.* at 35.

99. *See Socialist Workers Party*, 458 F. Supp. at 904.

100. *Id.* at 905.

101. *See Breitel Report*, *supra* note 11, at 23, 36.

102. *Id.* at 22.

103. *Id.* at 35.

means utilized by the government to achieve its ends is the seizure of the contents of communications concerning the organization and the members of the organization. The material thus obtained ranges from the names of members of the organization through data on its financial resources to information concerning the political beliefs and activities of individual members and their personal habits and relationships. The information is obtained by informers who overhear and participate in conversations among the members of the organization.

III. THE NATURE OF THE PRIVACY INTEREST

The protection of the fourth amendment is available when the person invoking its aid can claim a "reasonable," "justifiable," or "legitimate" expectation of privacy.¹⁰⁴ The presence or absence of such an expectation is normally to be determined by a two-part analysis: whether the individual exhibits an actual, subjective expectation of privacy and, if so, whether the individual's subjective expectation of privacy is, viewed objectively, legitimate under the circumstances.¹⁰⁵

The first inquiry is whether members of political organizations have a subjective expectation of privacy as to information about their political beliefs and activities and information about their personal lives. In order to determine whether such an actual expectation exists, it is necessary to examine the nature of the concept of privacy.

The dictionary defines privacy as "the quality or state of being apart from the company or observation of others," an "isolation, seclusion or freedom from unauthorized oversight or observation."¹⁰⁶ Privacy is most easily understood in relation to a material structure such as a home or an office. The privacy claim relating to a home or an office is the right to determine who shall enter.¹⁰⁷

104. See *Smith*, 442 U.S. at 740.

105. *Smith*, 442 U.S. at 741; *Katz*, 389 U.S. at 361 (Harlan, J., concurring). For a discussion of conflicting interpretations of this approach to fourth amendment claims, see *infra* notes 134-44 and accompanying text.

106. WEBSTER'S THIRD INTERNATIONAL DICTIONARY UNABRIDGED 1804 (1971). The concept of invasion of privacy is found in the law of torts as well as in constitutional law. See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

107. Cf. *Rakas*, 439 U.S. at 144 n.12 ("[o]ne of the main rights attaching to property is

Privacy as to information about oneself is a more abstract concept. Professor Alan Westin has suggested that the matter be approached by defining privacy as "the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."¹⁰⁸

Westin's definition of privacy derives from the universality of certain characteristics of interpersonal relationships in human societies.¹⁰⁹ The individual in any civilization will alternate between the use of "reserve and restraint" to provide "an area of privacy"¹¹⁰ and the seeking of "disclosure and companionship."¹¹¹

The reason for the universality of this process is that individuals have conflicting roles to play in any society; to play these different roles with different persons, the individual must present a different "self" at various times. Restricting information about himself and his emotions is a crucial way of protecting the individual in the stresses and strains of this social interaction.¹¹²

Because human beings play roles, an individual privacy interest must be conceptualized as multi-faceted. The individual will regulate the outward flow of information concerning himself or herself according to the substance of the information at issue and according to the identity of the recipient of that information. The nature of a privacy interest will thus vary according to those same two factors: substance of information and identity of designated recipient.

For example, an individual's privacy interest can differ according to whether the substance of the information at issue concerns that individual's membership in an organization, his or her associations and activities within that organization, or his or her personal life. Although information as to one's membership in mainstream civic and political organizations such as the Lion's Club or the Democratic and Republican parties is generally viewed as a matter of public record, membership in minority or dissenting civic and political groups such as the NAACP,¹¹³ the

the right to exclude others . . .").

108. A. WESTIN, *supra* note 28, at 7.

109. *Id.* at 12-13.

110. Murphy, *Social Distance and the Veil*, 66 AM. ANTHROPOLOGIST 1257 (1964) (quoted in A. WESTIN, *supra* note 28, at 13).

111. A. WESTIN, *supra* note 28, at 13.

112. *Id.* (footnote omitted).

113. See generally *NAACP v. Alabama*, 357 U.S. 449 (1958).

Communist Party or the John Birch Society is generally perceived as a private matter.¹¹⁴ "Membership privacy represents a core secret for many civic organizations, especially those advocating controversial ideas."¹¹⁵ A related, but more intense, privacy interest attaches to an individual's associations and activities within political organizations. "[P]rivacy is essential if the individuals involved are to be able to contemplate and to express their views with primary loyalty to the organization."¹¹⁶

An individual's privacy interest will be most intense when the substance of the information concerns his or her personal life.¹¹⁷ The human individual is commonly conceived of as having, and needing, an ultimate core of autonomy.¹¹⁸ Information concerning the core self is revealed only to the closest intimates under circumstances of emotional stress or euphoria. Thus, the individual releases information concerning his or her personal life only when the intense privacy interest mandated by the substance of the information coincides with an extreme degree of intimacy between the self and the designated recipient of the information.

The second factor determining the nature of a privacy interest is the identity of the designated recipient of the information in issue. A human individual's closest intimates form an inner circle. The individual's relations with all other persons can be described in terms of a concentric series of circles or zones of privacy sur-

114.

Forced public disclosure of members' names could lead to social sanctions against the members. . . . In democratic societies a legal right to privacy for membership lists and officers' names has been given to labor unions, religious and political bodies, and civil-rights organizations, especially when those groups were facing hostile community pressures.

A. WESTIN, *supra* note 28, at 43.

115. *Id.*

116. *Id.* at 46. "It is useful to recall that the Constitution of the United States was itself written in a closed meeting in Philadelphia. . . . Historians are agreed that if the convention's work had been made public contemporaneously, it is unlikely that the compromises forged in private sessions could have been achieved. . . ." *Id.* Consider also the fact that today the deliberations of juries and the conferences of judges are carried on in formal secrecy. *See id.* at 45.

117. Information concerning personal life is defined, for the purposes of this Article, as including, but not limited to, data about cohabitational status, marital strife, and personal habits. This definition is based upon information collected by government informers in past surveillance of political organizations. *See supra* notes 95-103 and accompanying text.

118. A. WESTIN, *supra* note 108, at 33.

rounding the core self.¹¹⁹ The substance of the information and the recipient's location within a circle of intimacy are interrelated issues.¹²⁰ The flow of information to the outer circles of privacy is regulated by the individual according to the substance of the information and his or her degree of intimacy with the designated recipient.¹²¹ Choice is central.

Information concerning a person's political associations and beliefs, or even concerning a person's membership in a non-mainstream civic or political organization, is not typically made available to recipients in the outermost zone of relationship. Although individual members of the same political organization generally have no privacy interest in their political beliefs, associations, or memberships as against each other, those same persons may have privacy interests in that same substantive information as against recipients outside of the organization, in the outermost circles of intimacy.¹²²

In the view of most Americans, the government as recipient, personified by its agents, falls into the outermost circle of intimacy.¹²³ The American people have always placed a high value on the concept of personal liberty, with that concept's traditional overtones of freedom from government intrusion into the private areas of one's life.¹²⁴ The government informer who poses as po-

119. *Id.* See also K. LEWIN, *RESOLVING SOCIAL CONFLICTS* 21 (1948).

120. A. WESTIN, *supra* note 28, at 33.

121. *Id.*

122. "If all [intra-organizational] written memos and policy discussions were subject to immediate beginning publication, or if private organizations knew themselves to be under continuous monitoring by government agents, much of the debate would automatically become formalized." *Id.* at 46.

123.

Most persons need to give vent to their anger at "the system," "city hall," "the boss," and various others who exercise authority over them, and to do this in the intimacy of family or friendship circles, or in private papers, without fear of being held responsible for such comments. This is very different from freedom of speech or press, which involves publicly voiced criticism without fear of interference by government and subject only to private suit. Rather, the aspect of release concerned here involves commentary that may be wholly unfair, frivolous, nasty, and libelous, but is never socially measured because it is uttered in privacy.

Id. at 35-36.

124. In the words of Justice Brandeis: "The makers of our Constitution . . . conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Cf. Amsterdam, *supra* note 26, at 353 ("[t]he Bill

litical associate and friend penetrates, under false pretenses, into the inner zones of intimacy.

The most serious threat to the individual's autonomy is the possibility that someone may penetrate the inner zone and learn his ultimate secrets, either by physical or psychological means. This deliberate penetration of the individual's protective shell, his psychological armor, would leave him naked to ridicule and shame and would put him under the control of those who knew his secrets.¹²⁵

Even when the government informer does not succeed in penetrating to the "core self," damage is done to human autonomy¹²⁶ by virtue of the government's surreptitious accession to the position of recipient of information which the individual would not have made available to persons or entities outside of the inner circles of intimacy.

As previously stated, the presence or absence of an actual expectation of privacy as to a particular item of information depends on two factors: the substance of the information, and the identity of the person desiring access to the information. It is fair to conclude that individual members of political organizations have actual expectations of privacy as against strangers and as against the government with respect to information concerning their membership in political organizations,¹²⁷ their political beliefs, associations, and activities within those organizations, and their personal lives. Individual members of political organizations may also have actual expectations of privacy regarding their personal lives as against their political associates, as well as against strangers and

of Rights in general and the fourth amendment in particular are profoundly anti-Government documents"); Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1138 (1982) ("[o]ur tradition is to mistrust the state and create an area of autonomy for each individual, free from the government's malignant or benign interference").

125. A. WESTIN, *supra* note 28, at 33.

126.

In democratic societies there is a fundamental belief in the uniqueness of the individual, in his basic dignity and worth as a creature of God and human being, and in the need to maintain social processes that safeguard his sacred individuality. Psychologists and sociologists have linked the development and maintenance of this sense of individuality to the human need for autonomy—the desire to avoid being manipulated or dominated wholly by others.

Id. (footnote omitted).

127. An exception must be made for memberships which are matter of public record. For example, a registered voter has no expectation of privacy as against the government concerning the information that he or she is a Democrat or a Republican.

the government. The degree of intensity of the actual expectation of privacy will vary depending upon the precise item of information sought and the identity of the proposed recipient.

The Supreme Court's treatment of government use of informers to apprehend persons suspected of criminal activity is not inconsistent with the foregoing analysis of actual expectations of privacy. For example, in *Hoffa v. United States*,¹²⁸ one of the most frequently cited informer cases, the Court found that the fourth amendment does not protect a "wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."¹²⁹ Implicit in the notion of "misplaced belief" is the view that the wrongdoer had an actual expectation of privacy as against the government,¹³⁰ although obviously not as against his associates in crime to whom he was making the statements in issue. Mr. Hoffa's actual privacy interest in information about his criminal activity was seen by the Court as varying according to the identity of the recipient of that information: he had no privacy expectation as against confederates in crime,¹³¹ but a strong privacy expectation as against the government. Implicit in this recognition of the multi-faceted nature of a privacy interest is one of the touchstones of the public-interest mode of analysis: evaluation of privacy interests *as being held against the government* rather than as conceptually isolated from the government conduct in the case.¹³²

The existence of an actual, subjective expectation of privacy is only the first of two elements that must be present. An actual expectation of privacy will be protected only when it is considered to be objectively legitimate.¹³³

Two approaches to the question of the legitimacy of an expectation of privacy are possible. The first is that suggested by Justice Rehnquist in *Rakas v. Illinois*,¹³⁴ the second is that sup-

128. 385 U.S. 293 (1966).

129. *Id.* at 302.

130. *Accord*, *United States v. White*, 401 U.S. 745, 751-52 (1971).

131. The phrase "no privacy expectation" is here used to express the concept that the individual does not object to his criminal associates' possessing information about his criminal activity. On the other hand, the individual does object to the government's possessing that same information.

132. See *supra* notes 54-57 and accompanying text.

133. See *supra* note 16.

134. 439 U.S. 128 (1978).

ported by Justice Harlan in his dissenting opinion in *United States v. White*.¹³⁵ Justice Rehnquist's view is that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."¹³⁶ Justice Harlan's alternative view is summarized in two sentences:

Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and the risks without examining the desirability of saddling them upon society. The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks [of the government conduct in question] without at least the protection of the warrant requirement.¹³⁷

Each of these approaches is tailored to meet the needs of a certain type of case.

The issue formulated in *Rakas* was whether petitioners' personal fourth amendment rights had been violated by a government search of the interior of the automobile in which they were passengers.¹³⁸ The fact pattern in *Rakas* thus falls into the first category of cases, the category to which the private-interest model of the fourth amendment is appropriate. In this category, the issue is whether the person objecting to the government conduct is the person whose privacy rights were actually violated.¹³⁹ The issue in *White* was whether the government's use of an electronic transmitting device on the person of an informer violated the defendant's justifiable expectation of privacy.¹⁴⁰ The fact pattern in *White* thus falls into the second category of cases, the category to

135. 401 U.S. 745 (1971).

136. *Rakas*, 439 U.S. at 144 n.12.

137. *White*, 401 U.S. at 786 (Harlan, J., dissenting). Harlan's reference to "risk" is instructive; for a discussion of "risk theory," see *supra* notes 159-222 and accompanying text.

138. *Rakas*, 439 U.S. at 128. Because petitioners had no possessory interest in the automobile, the Court, in an opinion by Justice Rehnquist, found that petitioners had no legitimate expectation of privacy in the interior of the automobile in which they were passengers and hence could not object to the government's search.

139. See *supra* notes 68-71 and accompanying text.

140. *White*, 401 U.S. at 745. The Court found that the government's use of an electronic device to ensure the accurate reproduction of words the informer had lawfully overheard did not offend defendant's justifiable expectation of privacy. The underlying government conduct of the use of an informer was assumed, on the basis of *Hoffa v. United States*, 385 U.S. 293 (1966), to be proper.

which the public-interest model of the fourth amendment is appropriate: the issue is whether the government conduct is such as to intrude upon a citizen's legitimate expectation of privacy.¹⁴¹

Justice Rehnquist's suggested approach to the problem of the legitimacy of an expectation of privacy is appropriate to the cases, such as *Rakas*, which fall into the first category; Justice Harlan's views are more compatible with cases, such as *White*, which fall into the second category. Justice Rehnquist's approach is retrospective and attuned to the status quo. One looks to the present state of property law or to social practices that "are recognized and permitted"¹⁴² to determine whether the asserted expectation of privacy is "legitimate" in the sense that the expectation is legitimately "personal" to the claimant. This form of inquiry, which might be called the "retrospective inquiry," is compatible with the private-interest model of the fourth amendment. Like private-interest analysis, the retrospective inquiry has only one focal point: the asserted privacy interest. The government conduct in the case is not in issue. The retrospective inquiry is also akin to private-interest analysis in that it evaluates privacy interests as held against fellow citizens¹⁴³ rather than as against the government.¹⁴⁴

Justice Harlan's approach to the problem of whether the protection of the fourth amendment is properly afforded to an expectation of privacy is, on the other hand, prospective in nature. One questions whether it will be desirable¹⁴⁵ to live in a society in which the expectations of privacy in question are not protected by the fourth amendment against unreviewable government action. This prospective inquiry is compatible with public-interest analysis because it focuses on both the privacy expectation and the government conduct, because it views privacy expectations as being held against the government rather than against fellow citizens, and

141. See *supra* notes 71-74 and accompanying text.

142. *Rakas*, 439 U.S. at 144 n.12 (emphasis supplied).

143. See *id.* ("[o]ne of the main rights attaching to property is the right to exclude others . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude").

144. See *supra* notes 54-57 and accompanying text.

145. A value-laden term such as "desirable" must be interpreted in terms of its frame of reference. The frame of reference used here is the system of representative democracy in the United States. "The critical question, therefore, is whether *under our system of government, as reflected in the Constitution*, we should impose on our citizens the risks . . ." *White*, 401 U.S. at 786 (Harlan, J., dissenting) (emphasis supplied).

because of the breadth of its vision.¹⁴⁶

In fact, the retrospective inquiry, which is so well suited to fact patterns conforming to the private-interest model, is an unsound tool of analysis for fact patterns conforming to the public-interest model. Since the retrospective inquiry looks to the status quo as a source of legitimacy for expectations of privacy, that inquiry cannot logically be applied to a case which places in issue the continuance of the status quo or which requires the Court to articulate a vision of the future. For example, the status quo with respect to government domestic political surveillance by means of informers is, under the Court's cases (although not under the current FBI guidelines¹⁴⁷), that the government may surreptitiously place informers into lawful domestic political groups without conforming to an objective standard for intervention and without being subjected to subsequent judicial review.¹⁴⁸ A citizen who is aware of this current state of the law can have no "legitimate" expectation of privacy as against government use of informers.¹⁴⁹ Because it is fundamental to human nature to trust one's close associates despite all warnings to the contrary,¹⁵⁰ he or she will very likely retain an actual expectation of privacy against government domestic political surveillance,¹⁵¹ but certainly, according to the

146. See *supra* notes 54-63 and accompanying text.

147. See *supra* notes 6-8 and accompanying text.

148. See, e.g., *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 202 (1966); *Lopez v. United States*, 373 U.S. 427 (1963); *On Lee v. United States*, 343 U.S. 747 (1954). These cases are discussed in Section V of this Article; see *infra* notes 159-222 and accompanying text.

149. If a reasonable person would have known that an actual expectation of privacy would probably be frustrated by subsequent events, then that actual expectation of privacy is not "reasonable" and hence not "legitimate." Herein lies the connection between assumption-of-risk and legitimate-expectation-of-privacy analysis. Cf. *Walter v. United States*, 447 U.S. 649, 663-65 (1980) (Blackmun, J., dissenting).

150. This truth is demonstrated by the continuing success of government undercover narcotics "buy" programs. If persons engaged in criminal activity continue to trust their partners in crime despite their almost certain knowledge of the widespread government use of undercover officers, then how much more likely is it that a citizen engaged in lawful political activity will continue to trust his or her political associates despite the current state of the law?

151. It should be noted, however, that in the extreme case, government action can even condition subjective, actual expectations of privacy. Professor Amsterdam has illustrated this point. "If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance." Amsterdam, *supra* note 34, at 384. The United States Supreme

retrospective inquiry, that expectation could not be deemed "reasonable" or "legitimate" in light of the current state of the law.

Since the government has been doing it, the government may continue to do it. In brief, the government can, by its conduct, determine whether or not our expectations of privacy will be viewed as legitimate.¹⁵² It is for this reason that the prospective inquiry must be made—that is, the inquiry of "whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks . . . without at least the protection of the warrant requirement."¹⁵³ In the language of expectations of privacy, the question becomes whether a particular expectation, here an expectation of privacy as against government domestic political surveillance by means of informers, is "legitimate" in the normative sense.¹⁵⁴

The norms in issue are common to all Western democratic societies and have to do with the fundamental question of what constitutes a desirable relationship between the individual and the state. Opposed to the individual's need for privacy is society's need to engage in surveillance to guard against anti-social conduct.¹⁵⁵

Any social system that creates norms—as all human societies do—must have mechanisms for enforcing those norms. . . . In these processes each society sets socially approved machinery for penetrating the privacy of individuals or groups in order to protect personal and group rights and enforce the

Court has recognized this fact and has noted that, in certain cases, "a normative inquiry would be proper." *Smith*, 442 U.S. at 741 n.5.

152. It was for this reason that, in *White*, Justice Harlan felt the need to go beyond the two-part test of actual and reasonable expectations of privacy that he himself had formulated in *Katz*. He saw the problem of the conditioning of subjective expectations, *see supra* note 151, and also perceived the way in which past and present government practices determine what risks a citizen can be said to have assumed and thus whether his actual expectations can be said to be legitimate. "The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk." *Id. White*, 401 U.S. at 787.

153. *Id.*

154. Although the issue of the government's ability to alter our expectations of privacy through its past and present conduct is usually discussed in terms of the conditioning of actual expectations, the problem looms just as large in the realm of the legitimacy of the expectations. The Court's dictum that "a normative inquiry would be proper" in situations in which government has conditioned actual expectations applies with equal force to the situations in which past government conduct has determined that certain expectations of privacy are not, in light of the status quo, "legitimate." *See Smith*, 442 U.S. at 741 n.5.

155. A. WESTIN, *supra* note 28, at 19.

society's rules and taboos.¹⁵⁶

There is a continuum between, at one pole, total deference to individual privacy interests, and, at the other, total deference to society's need to ensure conformity. The point on that continuum at which the balance is struck is determined by the nature of the political system adopted by the relevant social group. For example, the balance between the individual right to privacy and the state's right to enforce its politico-moral norms is struck at radically different points on the continuum by totalitarian political systems and democratic political systems. The totalitarian political regimes tend to maximize the government's ability to enforce political and social norms; such regimes minimize the zone of individual privacy within which a person is free not to conform:

With their demand for a complete commitment of loyalties to the regime, the literature of both fascism and communism traditionally attacks the idea of privacy as "immoral," "anti-social," and "part of the cult of individualism." . . . Autonomous units are denied privacy, traditional confidential relationships are destroyed, surveillance systems and informers are widely installed, and thorough dossiers are compiled on millions of citizens.¹⁵⁷

The democratic regimes maximize individual privacy rights and minimize the government's ability to ensure political and social conformity. "[A] balance that ensures strong citadels of individual and group privacy and limits both disclosure and surveillance is a prerequisite for liberal democratic societies."¹⁵⁸

To summarize, an examination of privacy interests in the public-interest mode of analysis has two elements. First, the presence or absence of an actual privacy interest against the government is determined. Second, once such an actual privacy interest is identified, Justice Harlan's prospective inquiry concerning the legitimacy of the expectation is employed: will it be desirable to live in a society in which that expectation is not protected by the fourth amendment against unreviewable government action? The applicable norms are those of Western democratic societies.

156. *Id.* at 20. Is a magistrate's finding of probable cause and issuance of a warrant appropriate? Or is *ex post facto* judicial review of the "reasonableness" of the "penetration" socially satisfactory? The precise nature of the "socially approved machinery" appropriate to government penetration of the privacy of political organizations and the privacy of the individual members of those organizations is a topic appropriate for a subsequent article.

157. A. WESTIN, *supra* note 28, at 23.

158. *Id.* at 24.

IV. THE INFORMER CASES REVISITED: ASSUMPTION OF RISK THEORY

Assumption-of-risk theory is not an appropriate tool for resolution of the problem of government domestic political surveillance by means of informers. Assumption-of-risk theory is predicated upon the intervention of a third party between the individual and the government, and there is no such third party in the case of government infiltration of political groups by means of informers. That risk theory nevertheless has been employed in determining the constitutional propriety of government use of informers is a result not of logic, but of historical accident. The connection lies in dicta contained in the informer cases,¹⁵⁹ dicta which often have been quoted in the recent third-party risk cases.¹⁶⁰

The most frequently quoted phrase is found in the 1966 case of *Hoffa v. United States*.¹⁶¹ There the Court stated that the fourth amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."¹⁶² Those few words, articulated prior to formation of the *Katz* concept of a legitimate expectation of privacy,¹⁶³ have, over the years, achieved the status of a full-blown constitutional doctrine: the doctrine of assumption of risk. The doctrine in its modern form stands for the proposition that any citizen who voluntarily reveals information to a third party, a party other than the government, no longer has an expectation of privacy as to the substance of the information revealed.¹⁶⁴ One "assumes the risk" that the third party will pass the revealed information on to other persons.

A fundamental misapprehension of the role of the fourth amendment is implicit in both the *Hoffa* phrase concerning a "wrongdoer's misplaced belief"¹⁶⁵ and the *White* phrase that "one

159. *E.g.*, *United States v. White*, 401 U.S. 745 (1971); *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 202 (1966); *Lopez v. United States*, 373 U.S. 427 (1963); *On Lee v. United States*, 343 U.S. 747 (1952).

160. *See, e.g.*, *Smith v. Maryland*, 442 U.S. 735 (1979); *United States v. Miller*, 425 U.S. 435 (1976).

161. 385 U.S. 293 (1966).

162. *Id.* at 302.

163. *See Katz v. United States*, 389 U.S. 347 (1967) (decided one year after *Hoffa*).

164. *See Smith v. Maryland*, 442 U.S. 735 (1979); *United States v. Miller*, 425 U.S. 435 (1976).

165. *Hoffa*, 385 U.S. at 302.

contemplating illegal activities must realize and risk"¹⁶⁶ In the words of Justice Harlan, this approach "misses its mark entirely. [Such an approach] does not simply mandate that criminals must daily run the risk of unknown eavesdroppers prying into their private affairs; it subjects each and every law-abiding member of society to that risk."¹⁶⁷ The fourth amendment's warrant requirement "is designed not to shield 'wrongdoers,' but to secure a measure of privacy and a sense of personal security throughout our society."¹⁶⁸

Implicit in the theory of assumption of risk is the notion that actual and legitimate expectations of privacy regarding the substance of information are the same regardless of the identity of the proposed recipient of that information.¹⁶⁹ A finding of lack of a legitimate expectation of privacy as against a fellow citizen is thus viewed, under risk theory, as entailing a lack of an expectation of privacy as against the government. The government is, therefore, in theory, free to present itself to a third party (whether that party is, for instance, a bank¹⁷⁰ or a telephone company¹⁷¹), identify itself as the government, request the revealed information, and receive it. Although the doctrine potentially encompasses conversations between private parties, no case has as yet held that a citizen, merely by the act of speaking, loses his or her expectation of privacy as against the government in the contents of the spoken communication.¹⁷² The informer cases, however, have come very close to supporting that proposition.

A central consequence of the risk doctrine's failure to distinguish between citizens and the government as recipients of infor-

166. *White*, 401 U.S. at 745.

167. *Id.* at 790 (dissenting opinion).

168. *Id.* In terms of the fourth amendment analysis developed in Part I, see *supra* notes 34-94 and accompanying text, the *Hoffa* and *White* Courts fell into the trap of applying a private-interest analysis to a public-interest fact pattern.

169. For a discussion of the concepts of actual and legitimate expectations of privacy, see *supra* notes 104-58 and accompanying text.

170. *E.g., Miller*, 425 U.S. at 435.

171. *E.g., Smith*, 442 U.S. at 735.

172. Compare *Smith*, 442 U.S. at 735 (distinguishing lists of telephone numbers from the contents of communications), and *Katz*, 389 U.S. at 347 (petitioner had a legitimate expectation of privacy in the contents of his telephone communications as against government intrusion by means of electronic eavesdropping), with *Hoffa*, 385 U.S. at 302 (the fourth amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it").

mation is that the government conduct in question is never exposed to constitutional scrutiny. Since the subject is held to have knowingly "assumed the risk" that a third party might pass information on to other persons, any conduct engaged in by the government to obtain the information in question from a third party cannot possibly intrude upon an expectation of privacy which has, by definition, ceased to exist.

It is important to emphasize that the government use of informers to infiltrate and seize information about political organizations does not involve third parties. The government does not passively receive information from a third-party volunteer, or even subpoena the information from a neutral third party such as a bank or telephone company. Rather, infiltration of lawful domestic political groups by paid government informers involves direct contact between government and citizen: the government actively, by means of deception and disguise, seeks out the person who is the object of its attentions, falsely represents itself as friend or colleague, and listens.

The cases uniformly cited as authority for application of the risk doctrine to the informer situation are *On Lee v. United States* (1952),¹⁷³ *Lopez v. United States* (1963),¹⁷⁴ *Lewis v. United States* (1966),¹⁷⁵ *Hoffa v. United States* (1966),¹⁷⁶ and *United States v. White* (1971).¹⁷⁷ Of these five cases, three—*On Lee*, *Lopez*, and *White*—are primarily concerned with the use of electronic surveillance by informers in order to record the conversations with petitioners or in order to broadcast their conversations with petitioners to third parties. Due to the widely divergent policy considerations present in electronic surveillance cases, as opposed to those cases involving more conventional law-enforcement techniques,¹⁷⁸ the portions of the *On Lee-Lopez-White* trilogy dealing

173. 343 U.S. 747 (1952).

174. 373 U.S. 427 (1963). *Lopez* was cited approvingly in *United States v. Caceres*, 440 U.S. 741 (1979).

175. 385 U.S. 206 (1966).

176. 385 U.S. 293 (1966).

177. 401 U.S. 745 (1971). *White* was cited approvingly in *United States v. Caceres*, 440 U.S. 741 (1979).

178. "As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping." *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting). This analysis proved persuasive some forty years later:

While "[t]he requirements of the Fourth Amendment are not inflexible, or ob-

with electronic surveillance are of only marginal utility in resolving the problem of the use of informers to infiltrate political groups. *Lopez* and *White*, however, are also cross-over cases dealing with the more conventional use of informers as well as with the use of electronic recording devices by informers. Of these two, *White* simply recites the holdings of *Lopez*, *Lewis*, and *Hoffa*, and thus is of little use.¹⁷⁹ *Lopez*, on the other hand, was a case of first impression upon which the Court heavily relied in drafting its *Hoffa* opinion. *Lewis* and *Hoffa* confront the problem of police undercover operations uncomplicated by the use of electronic surveillance and thus shed more light on the subject than do their close relatives in the field of electronic surveillance. None of the three major cases for the purposes of this article—*Lopez*, *Lewis*, and *Hoffa*—deals with government domestic political surveillance.

In *Lopez*, an Internal Revenue agent tape-recorded an attempt by Lopez to bribe him.¹⁸⁰ Both the agent's testimony and his tape recordings were introduced into evidence at the trial. The majority opinion dealt with the admissibility of the agent's testimony only in passing, for petitioner had not even objected to the admission of that testimony at trial.¹⁸¹ The dissenting opinions did not mention the admissibility of the agent's testimony; their focus was solely on the admissibility of the electronically recorded evidence. Despite *Lopez*'s negligent treatment of the issue at hand and the singularity of the *Lopez* fact pattern, the *Hoffa* Court seized upon the majority opinion and one of the dissenting opinions in *Lopez* in an attempt to buttress its conclusion that *Hoffa* had no constitutional interest that had been violated by the activities of the informer Partin.¹⁸² A close examination of *Lopez* is, therefore, in

tusely unyielding to the legitimate needs of law enforcement," . . . it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded. Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices."

Berger v. New York, 388 U.S. 41, 63 (1967). Referring to phone taps, Justice Brandeis stated that "[s]ubtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet." *Olmstead*, 277 U.S. at 473 (dissenting opinion).

179. 401 U.S. at 749.

180. 373 U.S. at 430-31.

181. *Id.* at 438.

182. *Hoffa*, 385 U.S. at 302-03.

order.

Revenue Agent Davis was investigating Lopez's resort hotel for suspected evasion of the excise tax. Agent Davis identified himself to Lopez as a federal agent and was given an interview, in the course of which Lopez proffered to Davis a bribe of \$420 in the hope of persuading him to whitewash the results of his investigation. Agent Davis reported the bribe to his superiors and returned for the negotiations with Lopez carrying a hidden tape recorder.¹⁸³ At trial, Lopez objected only to admission into evidence of the tape recordings. On appeal, he raised for the first time the question of the admissibility of Agent Davis's testimony. The Court dealt with the question of the admissibility of the agent's testimony in three summary sentences:

[Petitioner's] theory is that, in view of Davis's alleged falsification of his mission, he gained access to petitioner's office by misrepresentation and all evidence obtained in that office, i.e., his conversation with petitioner, was illegally "seized." In support of this theory he relies on *Gouled v. United States*, 255 U.S. 298, and *Silverman v. United States*, 365 U.S. 505. But under the circumstances of the present case, neither of these decisions lends any comfort to petitioner, and indeed their rationale buttresses the conclusion that the evidence was properly admitted. See *On Lee v. United States*, 343 U.S. 747.¹⁸⁴

An examination of the facts of the three cases cited provides some clues as to the Court's reasoning. In *Silverman*, the "spike mike" case, government agents drove a microphone into petitioner's wall without his knowledge, thereby trespassing onto a constitutionally protected area.¹⁸⁵ In *Gouled*, a friend of petitioner, who was cooperating with the government in its investigation of Gouled, visited Gouled in his office under the pretense of making a social call and seized physical evidence when petitioner stepped out of the office for a few minutes.¹⁸⁶ Likewise, in *On Lee*, a friend of the petitioner who had, unbeknownst to petitioner, begun to assist the government in its investigations, broadcast his conversations with On Lee to eavesdropping government agents.¹⁸⁷ In *Silverman*, *Gouled* and *On Lee*, then, the petitioners were unaware that the government was involved at all in their

183. *Lopez*, 373 U.S. at 430.

184. *Id.* at 437-38.

185. *Silverman v. United States*, 365 U.S. 505, 506 (1961).

186. *Gouled v. United States*, 255 U.S. 298 (1921).

187. *On Lee*, 343 U.S. at 749.

transactions, whereas in *Lopez* petitioner was fully aware that he was dealing with an agent of the federal government. In *Lopez*, Agent Davis gave full notice of his authority and his purpose¹⁸⁸—to investigate suspected criminal activity—whereas in *Silverman*, *Gouled*, and *On Lee* the government gave no notice that its agents were even on the scene.¹⁸⁹

The *Lopez* court must have been making this same distinction when it wrote:

In *On Lee*, the defendant had been induced to make certain statements by an old acquaintance who, without the defendant's knowledge, had turned government informer and was carrying a small concealed microphone which transmitted the conversation to a narcotics agent some distance away. Thus any differences between *On Lee* and this case cut against petitioner.¹⁹⁰

In *Lopez*, Agent Davis never concealed the fact that he was an agent of the federal government. *Lopez* was a bribery case in which the federal officer who was the target of the bribe cooperated with the police. *Lopez* was, therefore, not an "informer case" in the traditional sense of the words.

The *Lopez* dissenting opinion later cited by the Court to shore up its holding in *Hoffa* was written by Justice Brennan. It, like the other dissenting opinions in *Lopez*, dealt only with the question of electronic surveillance. To stress the dangers to individual privacy wrought by government use of electronic surveillance as compared to the lesser dangers to privacy wrought by more conventional law-enforcement techniques, Justice Brennan wrote: "The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we assume whenever we speak."¹⁹¹ It was this language that the Court quoted with approval in *Hoffa*.

Certainly Justice Brennan never intended to convey that there were no dangers at all to privacy interests arising from the more conventional law-enforcement techniques, nor did he mean to assert that these ordinary techniques were *per se* constitutional. That fact emerges quite clearly from the controversial passage

188. *Lopez*, 373 U.S. at 429.

189. *Silverman*, 365 U.S. at 509; *On Lee*, 343 U.S. at 729; *Gouled*, 255 U.S. at 304.

190. *Lopez*, 373 U.S. at 438 n.10.

191. *Id.* at 465 (dissenting opinion).

read in context.¹⁹² Immediately preceding the passage, Justice Brennan had written: "The latter [conventional police stratagems such as eavesdropping and disguise, as contrasted with electronic surveillance] do not *so seriously* intrude upon the right to privacy."¹⁹³ While government deception and disguise may not be as intrusive as government electronic surveillance, the former is nonetheless quite intrusive.

Lewis and *Hoffa* were companion cases. Although *Lewis* was the lead opinion and is the more carefully reasoned of the two, the *Hoffa* opinion, with its dictum concerning "a wrongdoer's misplaced belief"¹⁹⁴ has, over time, been more frequently cited. Unfortunately, the light shed by *Hoffa* on government domestic political surveillance is minimal. Although the issue of the constitutionality of the government conduct of aggressively and by means of deceit placing an informer in the midst of a group of citizens was presented by the petition for certiorari,¹⁹⁵ the Court

192. The government had argued that to hold illegal Agent Davis's conduct in taping his conversations would render unconstitutional the entire gamut of police investigatorial techniques, including even the wearing of "plain clothes." *Lopez*, 373 U.S. at 465. According to Justice Brennan:

[T]his argument misses the point. It is not Agent Davis' deception that offends constitutional principles, but his use of an electronic device. . . . For there is a qualitative difference between electronic surveillance . . . and conventional police stratagems such as eavesdropping and disguise. The latter do not so seriously intrude upon the right of privacy. *The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.* But as soon as electronic surveillance comes into play, the risk changes crucially.

Furthermore, the fact that the police traditionally engage in some rather disreputable practices of law enforcement is no argument for their extension. Eavesdropping was indictable at common law and most of us would still agree that it is an unsavory practice. The limitations of human hearing, however, diminish its potentiality for harm.

Id. at 466 (emphasis added). This passage is not an endorsement of undercover police operations, whether in general or with particular regard to the concern of this Article: government placement of an informer in a political organization to seize communications by means of deceit.

193. *Id.* at 466 (emphasis added).

194. 385 U.S. at 302.

195. The question presented was as follows:

Whether evidence obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of a defendant during one criminal trial so violates the defendant's Fourth, Fifth and Sixth Amendment rights that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge.

chose not to deal with the problem as presented. Perhaps due to the confused state of the record below,¹⁹⁶ or perhaps due to the exigencies of garnering a majority for its four-three decision,¹⁹⁷ the Court chose to avoid the problems created by the alleged government deception and by the alleged government conduct of introducing an informer into the councils of the defense. Rather, the Court assumed only that Partin, a Teamsters Union official and the informer in question, had been "a government informer. . . and that the government compensated him for his services as such."¹⁹⁸ The Court dismissed as a "verbal controversy" the question of whether Partin had been "placed" rather than invited,¹⁹⁹ and the question of whether, assuming placement, it had been accomplished "deceptively."²⁰⁰

Unfortunately, once having concluded that the government (in the person of its agent, the informer Partin) had been present on the scene, the Court declined to venture further down that

Hoffa, 385 U.S. at 295.

196. Justice Stewart summarized the facts as such:

The chain of circumstances which led Partin to be in Nashville during the Test Fleet trial extended back at least to September of 1962. At that time Partin was in jail in Baton Rouge on a state criminal charge. He was also under a federal indictment for embezzling union funds, and other indictments for state offenses were pending against him. Between that time and Partin's initial visit to Nashville on October 22 he was released on bail on the state criminal charge, and proceedings under the Federal indictments were postponed. On October 8, Partin telephoned Hoffa in Washington, D.C., to discuss local union matters and Partin's difficulties with the authorities. In the course of this conversation Partin asked if he could see Hoffa to confer about these problems and Hoffa acquiesced. Partin again called Hoffa on October 18 and arranged to meet him in Nashville. During this period Partin also consulted on several occasions with federal law enforcement agents, who told him that Hoffa might attempt to tamper with the Fleet Street jury, and asked him to be on the lookout in Nashville for such attempts and to report to the federal authorities any evidence of wrongdoing that he discovered. Partin agreed to do so.

After the Test Fleet trial was completed, Partin's wife received four monthly installment payments of \$300 from government funds, and the state and federal charges against Partin were either dropped or not actively pursued.

385 U.S. at 297-98. On the basis of these facts the trial court found that "the government did not place this witness Mr. Partin in the defendants' midst . . . rather[,] . . . he was knowingly and voluntarily placed in their midst by one of the defendants." *Id.* at 299 n.4.

197. Chief Justice Warren dissented, Justices Douglas and Clark wished to dismiss the writs of certiorari as improvidently granted, and Justices White and Fortas took no part in the consideration or decision of the case. *Hoffa*, 385 U.S. at 293.

198. *Id.*

199. *Id.* at 295.

200. *Id.*

analytic road. Instead of examining the nature of the government conduct, as would have been appropriate in a public-interest-model case such as *Hoffa*, the Court looked only to the nature of the individual interest alleged. The issue, as perceived by the Court, was whether there existed a "constitutionally protected area"²⁰¹ which Partin, the informer, had invaded in order to converse with Hoffa. Because Partin had entered the only area which arguably was "constitutionally protected"—Hoffa's hotel room—by invitation, and because other conversations had occurred in public places such as the hotel lobby, the *Hoffa* Court found that "no interest legitimately protected by the fourth amendment is involved."²⁰² Only after concluding this analysis of individual interest in terms of trespass did the Court, turning to *Lopez* for support, write: "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."²⁰³

It appears, by the reference to the wrongdoer's "belief," that the Court may well have been providing a preview of the expectation-of-privacy approach that it would unveil the following term. But in that pre-*Katz* era, "[w]hat the Fourth Amendment protect[ed was] the security a man relies upon when he places himself or his property in a constitutionally protected area"²⁰⁴ Since the government had not trespassed, but rather had been invited, any privacy interest had been forfeited.²⁰⁵

The reasoning in *Lewis*, unlike that in *Hoffa*, commanded an

201. *Id.* at 301.

202. *Id.* at 302. Interestingly, in light of such subsequent cases as *Rakas v. Illinois*, 435 U.S. 922 (1978), there was no doubt in the Court's mind that Hoffa had standing. *Hoffa*, 385 U.S. at 300.

203. *Hoffa*, 385 U.S. at 302.

204. *Id.* at 301.

205. Likewise, because public places such as the hotel lobby where other Partin/Hoffa conversations took place are not constitutionally protected areas, there could be no interest protected by the fourth amendment. *Cf. White*:

Until *Katz v. United States*, neither wiretapping nor electronic eavesdropping violated a defendant's Fourth Amendment rights unless there had been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house "or curtilage" for the purposes of making a seizure.

White, 401 U.S. at 749 (discussing an informer carrying a radio that broadcast the informer's conversations with defendant to third-party law-enforcement officials).

eight-member majority of the Court. *Lewis*, the lead case in the *Lewis-Hoffa-Osborn*²⁰⁶ trilogy, is akin to *Hoffa* in that it relies on notions of constitutionally protected areas and consensual entries thereto in determining the existence of an individual right protected by the fourth amendment.²⁰⁷ *Lewis* is, however, unlike *Hoffa* in that it also focuses upon the nature of the government conduct in issue.²⁰⁸

Lewis involved a federal undercover narcotics operation in the course of which a federal agent telephoned Lewis, identified himself falsely as "Jimmy the Pollack" (sic), and asked if Lewis would sell him marijuana. Lewis replied to the agent's question in the affirmative and invited the agent into his home to purchase the narcotics.²⁰⁹ At trial, Lewis moved to suppress the marijuana and the agent's testimony regarding his conversations with Lewis. In holding that there had been no violation of petitioner's fourth amendment right, the Court reasoned, analogously to *Hoffa*, that although

the home is accorded the full range of Fourth Amendment protections . . . when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street.²¹⁰

However, "this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials."²¹¹ It is clear that the federal agent in *Lewis* had probable cause to believe that contraband was to be found inside peti-

206. *Osborn v. United States*, 385 U.S. 324 (1966), involved the admissibility of tape recordings made by an informer. The police had obtained judicial authorization for the informer's use of the tape recorder.

207. *Lewis*, 385 U.S. at 211.

208. *See id.* at 208-09.

209. *Id.* at 207.

210. *Id.* at 211. The Court went on to say that "[a] government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant." *Id.*

211. *Id.* The Court concluded by stating that "a citation to the *Gould* case . . . is sufficient to dispose of that contention." *Id.* at 211. *See also* *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 330 (1979) (Court relied on *Lewis* in finding that "there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees").

tioner's home.²¹²

The significant feature of the *Lewis* opinion is that, as is appropriate in a public-interest-model case, the opinion examined not just the nature of the individual interest involved, but also the nature of the government conduct. The government conduct was described as the obtaining of evidence by means of "stratagem and deception."²¹³ The government purpose was, of course, the prevention of crime.²¹⁴ The individual interest was in the inviolability of the home.²¹⁵ The Court noted that, "in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents,"²¹⁶ and found that the government action was constitutional. The closely reasoned *Lewis* opinion, going beyond the disingenuous *Hoffa* analysis to examine the nature of the government conduct and the weight of the government mission of crime prevention at stake in the sort of undercover police operations involved in these two cases, produced a nearly unanimous Court.

Interestingly, although *Lewis* concluded that the police undercover buy program was constitutional, and although *Hoffa* never addressed the constitutionality of government undercover operations, the Court in both cases repeatedly affirmed, in dicta, that the government's ability to engage in deception for the purpose of crime prevention was subject to constitutional limitations. Implicit in these reiterations of constitutional limitation is the notion that government undercover operations may constitute searches and seizures subject to the warrant clause or "reasonableness" stricture of the fourth amendment. The *Hoffa* Court, for instance, cautioned against interpreting its opinion to suggest "that a secret government informer is to the slightest degree more free from all relevant constitutional restrictions than is any other government agent"²¹⁷ The Court's position, it explained, was merely

212. Counsel for petitioner conceded probable cause in oral argument. *Lewis*, 385 U.S. at 208-09 n.4. In disapproving the search of the retail store in *Lo-Ji Sales* and the seizure of items displayed therein, the Court pointed out that, at the time of entry into the store, the law enforcement officials had probable cause to seize only two of the several hundred items eventually taken into custody. *Lo-Ji Sales*, 442 U.S. at 325-26.

213. *Lewis*, 385 U.S. at 208.

214. *Id.* at 210.

215. *Id.* at 211.

216. *Id.* at 209.

217. *Hoffa*, 385 U.S. at 311 (citing *Massiah v. United States*, 377 U.S. 201 (1964)). See

"that the use of secret informers is not *per se* unconstitutional."²¹⁸ Similarly, the *Lewis* Court wrote: "The various protections of the Bill of Rights . . . provide checks upon such official deception for the protection of the individual."²¹⁹ The Court explained:

[T]he particular circumstances of each case govern the admissibility of evidence obtained by stratagem or deception. . . . Were we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional *per se*.²²⁰

The teaching of *Lewis* and *Hoffa* that government use of informers is subject to constitutional restrictions mandates against the application of risk theory to domestic political surveillance, for the effect of applying risk theory to domestic political surveillance would be to place the government conduct in issue beyond the reach of constitutional scrutiny.

At the time that *Lewis* and *Hoffa* were written, the problem for the Court in ruling on the constitutionality of government practices was, once standing had been established, to ascertain the proper point at which to strike a balance between the state interest in maintaining order and the individual interest in personal security and autonomy. *Lewis* struck that balance in favor of the State and did so without the aid of risk theory.²²¹ *Hoffa* avoided the onerous chore of striking a balance but also ruled in favor of the State, equally without benefit of risk theory as it exists today.

also *Hoffa*, 385 U.S. at 302 n.6.

218. *Hoffa*, 385 U.S. at 311.

219. *Lewis*, 385 U.S. at 209.

220. *Id.* at 208-10. The *Lewis* Court quotes the Model Penal Code on this point:

Particularly, in the enforcement of vice, liquor or narcotics laws, it is all but impossible to obtain evidence for prosecution save by the use of decoys. There are rarely complaining witnesses. The participants in the crime enjoy themselves. Misrepresentation by a police officer or agent concerning the identity of the purchaser of illegal narcotics is a practical necessity. . . . Therefore, the law must attempt to distinguish between those deceptions and persuasions which are permissible and those which are not. MODEL PENAL CODE § 2.10, comment, p. 16 (Tent. Draft No. 9, 1959).

Id. at 210-11 n.6 (emphasis added).

221. *Lewis* weighed the government interest in controlling organized crime activities (the narcotics traffic) against the asserted individual privacy interest in the home and concluded that to rule the use of undercover officers unconstitutional in that situation would "severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest." *Lewis*, 385 U.S. at 210.

At present, the problem for the Court in ruling on the constitutionality of government practices is not to strike a balance but rather to determine whether the government conduct violates a citizen's legitimate expectation of privacy. Where government domestic political surveillance by means of informers is concerned, the assumption-of-risk theory is as useless to the present inquiry in determining legitimate expectations of privacy as it was to the former task of striking a balance.²²²

V. THE CONVERGENCE OF THE FIRST AND FOURTH AMENDMENTS

Government surveillance of domestic political organizations has often been challenged on first amendment grounds. Numerous cases have recognized that the first amendment right to associational privacy may be impermissibly chilled by unrestrained government investigation. Opinions such as *NAACP v. Alabama*²²³ and *Gibson v. Florida Legislative Investigation Committee*²²⁴ have es-

222. *Katz v. United States*, 389 U.S. 347 (1967) contains nothing to the contrary. The *Katz* dicta that "[w]hat a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection," *id.* at 351, has been used by "third-party-risk cases" such as *United States v. Miller*, 425 U.S. 435 (1976), and *Smith v. Maryland*, 442 U.S. 735 (1979), to justify holdings that when an individual turns over information to a bank or a telephone company, he or she "knowingly exposes" that information "to the public" and hence assumes the risk that the government may be made privy to it. However, domestic political surveillance does not involve third parties. Further, the operative word in the *Katz* dicta is "knowingly." "Knowingly" is a term of art in the legal profession and has been much defined. The definition currently regarded as authoritative is that of the Model Penal Code:

A person acts knowingly with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

MODEL PENAL CODE § 2.02(2)(b) (Proposed Official Draft 1962). Members of lawful domestic political organizations who converse amongst themselves about politics or about their personal affairs are aware neither that the act of engaging in such conversations entails exposure of the substance of their communications to the public nor that it is practically certain that the act of engaging in such conversations will cause the result of exposure of the contents of their communications to the public. The quotation from *Katz* that more accurately depicts the expectations of persons engaged in domestic political activities is as follows: "But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, 389 U.S. at 351. For a discussion of the differing natures of privacy expectations involved in revealing information to a friend, a political associate, the public and the government, see *supra* notes 104-58.

223. 357 U.S. 449 (1958).

224. 372 U.S. 539 (1963).

tablished that lawful domestic political organizations may not be compelled by the government to produce their membership lists. The opinion in *Watkins v. United States*²²⁵ placed similar limitations on the scope of inquiries by legislatures into domestic political organizations.²²⁶ In this Section, the relationship of the first and fourth amendments will be examined in order to determine whether judicial approval of clandestine government political surveillance under the fourth amendment is consonant with the first amendment principles in the field.

As a matter of general principle, it may be said that "[t]he Supreme Court has repeatedly emphasized that one of the main reasons for adoption of the Fourth Amendment was to provide citizens with the privacy protection necessary for the secure enjoyment of First Amendment liberties. First Amendment values permeate the Fourth Amendment."²²⁷ In recent years the cases exploring the relationship between the two amendments have dealt with three major issues: domestic political surveillance,²²⁸ freedom of the press,²²⁹ and prior restraints.²³⁰

The leading case in the area of domestic political surveillance is *United States v. United States District Court (Keith)*.²³¹ In an opinion in which all participating justices either joined or concurred, Justice Powell wrote:

National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of ordinary crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. . . . For private dissent, no less than open public discourse, is essential to our free society.²³²

In *Keith*, the government had wiretapped without a warrant members of a left-wing splinter political group, the White

225. 354 U.S. 178 (1957).

226. *Id.*

227. Reporters Comm. for Freedom of the Press v. American Telephone and Telegraph Co., 593 F.2d 1030, 1054 (D.C. Cir. 1978). See *Marcus v. Search Warrant*, 367 U.S. 717, 719 (1961) ("[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression"). See also *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Stanford v. Texas*, 379 U.S. 476 (1965).

228. See *Keith*, 407 U.S. 297 (1972).

229. See *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

230. See *Roaden v. Kentucky*, 413 U.S. 496 (1973).

231. *Keith*, 407 U.S. at 297.

232. *Id.* at 314-15.

Panthers. Because the case involved electronic surveillance, as opposed to informers, there was no contention that a search and seizure had not occurred. The problem for the *Keith* Court was whether the government interest in protecting the internal security of the United States was of such a nature as to render the warrant requirement inapplicable despite the government's clear invasion of the citizenry's legitimate expectation of privacy. The issue in *Keith*—the applicability of the warrant requirement—was thus several steps down the analytic road from the threshold issue which concerns this Article: whether government use of informers to protect the internal national security constitutes a search and seizure at all. Nevertheless, *Keith* sheds light on the public-interest analysis proposed in this Article by scrutinizing the nature of the individual privacy interest at stake.

First and foremost, *Keith* envisions the privacy expectation as being held against the government, not as existing in a vacuum.²³³ "The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized *official* eavesdropping deter vigorous citizen dissent and discussion of government action in private conversation."²³⁴ Fear that one's neighbor may overhear will not deter political dissent unless coupled with fear that the neighbor is an agent of the government. Second, *Keith* recognizes that although all official surveillance "risks infringement of constitutionally protected privacy of speech,"²³⁵ the purpose and nature of government conduct in political surveillance is distinct from the more conventional criminal investigations and, because of these differences, is more likely to infringe upon constitutionally protected speech.²³⁶ "Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of the intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent."²³⁷

Third, *Keith* embarks upon a normative inquiry. Justice Powell views the problem of norms in a democratic society through

233. *Id.*

234. *Id.* (emphasis added).

235. *Id.* at 320.

236. *Id.*

237. *Id.*

the lens of history:

"Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power" History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute when the Government attempts to act under so vague a concept as the power to protect "domestic security." Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.²³⁸

The *Keith* opinion makes the same point, albeit in more mundane terms, by quoting a U.S. Senator who explained his concern over what he thought to be a legislative proposal for an unchecked executive power of domestic electronic surveillance: "As I read it—and that is my fear—we are saying that the President, on his motion, could declare—name your favorite poison—draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists to be a clear and present danger to the structure and existence of the Government."²³⁹ The case law, in its present state, affords to the president precisely that same unchecked executive power of domestic political surveillance, except by means of informers rather than by electronic devices.

The next category of cases in which the first and fourth amendments converge involves freedom of the press. *Zurcher v. Stanford Daily*²⁴⁰ is the leading recent case. *Zurcher*, like *Keith*, is a good two steps removed from the problem of political surveillance by means of informers, the steps being measured in terms of degree of constitutional protection claimed. The issue with respect to political surveillance by means of an informer is whether the government conduct even constitutes a search and seizure; the issue in *Zurcher* was whether, given that the government conduct constituted a search and seizure and thus fell within the scope of the fourth amendment, and given that the search and seizure had been authorized by a warrant duly issued by a neutral magistrate,

238. *Id.* at 313-14 (quoting *Marcus v. Search Warrants*, 367 U.S. 717 (1961)).

239. *Keith*, 407 U.S. at 315, quoting 114 CONG. REC. 14,750 (statement of Sen. Hart) (floor debate on the Omnibus Crime Control and Safe Streets Act of 1968, H.R. 5037, 90th Cong., 2d Sess. § 2511(3)).

240. 436 U.S. 547 (1978).

the first amendment interests of the press were still not adequately protected.²⁴¹

In *Zurcher*, the police had searched a newspaper's premises for negatives, films, and pictures relevant as evidence in a pending criminal case involving assaults by demonstrators on police officers during a demonstration. The Supreme Court found that the strictures of the fourth amendment, if applied with "scrupulous exactitude,"²⁴² were sufficient to safeguard any additional first amendment interests which might be present where the target of the search was a newspaper. "Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices."²⁴³

The first lesson to be drawn from *Zurcher* is one of contrast. It is incongruous to afford so much protection to one form of first amendment freedom—freedom of the press—and so little to another form of first amendment freedom—freedom of speech in the form of private political dissent. It is equally anomalous for freedom of the press to be protected by the fourth amendment against the chilling effect of unreviewed seizure of materials linked by probable cause to a crime, while the freedom of speech of law-abiding citizens is afforded no fourth amendment protection against the chilling effect of seizure of information unrelated to crime.

Zurcher v. Stanford Daily is a case involving not only the issue of freedom of the press, but also the issue of prior restraint.²⁴⁴ The "prior restraint" category of cases involving both the first and the fourth amendments is of central importance to this Article; taken as a whole, these cases establish the principle that the shape of substantive fourth amendment rules is affected by the presence of first amendment values.²⁴⁵ The prior restraint cases

241. *Id.* at 566.

242. *Id.* at 565.

243. *Id.*

244. The object of the search and seizure in *Zurcher* was film.

245. See, e.g., *Walter v. United States*, 447 U.S. 649, 655 (1980); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 n.5, 327-28 (1979); *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978); *Roaden v. Kentucky*, 413 U.S. 496, 501-06 (1973); *Heller v. New York*, 413 U.S. 483, 489 (1973).

deal with the issues raised by searches for and seizures of books and films that arguably fall within the sphere of first amendment protection.

*Roaden v. Kentucky*²⁴⁶ preceded *Zurcher*, and is the leading modern prior-restraint case. *Roaden* stands for the proposition that the assessment of "reasonableness" under the fourth amendment must take account of first amendment values.²⁴⁷ The issue in *Roaden* was whether the seizure of a copy of a film contemporaneous with and incident to the arrest of the manager of the theatre where the film was shown might be accomplished without a warrant. The Court ruled that the seizure of the film was unconstitutional. "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material."²⁴⁸ The cornerstone of the Court's reasoning was that where the items seized are, ultimately, "ideas," a court must examine what is "unreasonable" in light of the values of freedom of expression.²⁴⁹ "The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness."²⁵⁰

Zurcher, too, demonstrates the impact of first amendment val-

246. 413 U.S. 496 (1973).

247. *Id.* at 497.

248. *Id.* at 501.

249. *Id.* at 504.

250. *Id.* The *Roaden* Court explicitly disavows that the absence of exigent circumstances constituted the basis for its finding that the seizure was unreasonable.

However, the opinion does note that there is no danger of destruction of evidence arising from the delay necessary to procuring a warrant when the film is being shown in a commercial theater open to the public. *Id.* at 505 n.6. Likewise, domestic political organizations will not vanish into thin air.

[O]rdinary human experience should teach that the seizure of a movie film from a commercial theater with regularly scheduled performances, where a film is being played and replayed to paid audiences, presents a very different situation from that in which contraband is changing hands or where a robbery or assault is being perpetrated.

Id. at 505.

When books and films are seized, "the materials seized [fall] arguably within First Amendment protection, and the taking [brings] to an abrupt halt an orderly and presumptively legitimate distribution or exhibition." *Id.* For these reasons, books and films are different than contraband, stolen goods, and instrumentalities of crime such as guns or knives. *Id.* at 502. Domestic political organizations are more analogous to books and films in this respect than to contraband, stolen goods, guns, or knives.

ues on the implementation of the warrant requirement. As the *Zurcher* Court explained: "Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'"²⁵¹ Justice Powell's concurring opinion in *Zurcher* develops this theme even further. Justice Powell suggests that, in judging the reasonableness of every warrant in light of the particular case, "a magistrate . . . can and should take cognizance of the independent values protected by the First Amendment" ²⁵²

By analogy, in determining whether a particular domestic political surveillance by means of an informer has intruded upon a citizen's legitimate expectation of privacy, a court can and should be sensitive to the first amendment values involved. An expectation of privacy as against a government undercover operation in the realm of criminal activity may be unreasonable and illegitimate, whereas a similar expectation of privacy against a government undercover operation in the realm of political activity may be reasonable and legitimate.²⁵³ It was perhaps this distinction towards which the *Hoffa* and *White* Courts were struggling when they wrote, respectively, that the fourth amendment does not protect "a wrongdoer's misplaced belief that a person to whom he

251. *Zurcher*, 436 U.S. at 465. The Court set forth its reasoning on this point in more detail in *Stanford v. Texas*, 379 U.S. 476 (1965):

In short . . . the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books and the basis for their seizure is the ideas which they contain. . . . No less a standard could be faithful to First Amendment freedoms. The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case.

Id. at 485 (footnotes omitted). Compare *Andersen v. Maryland*, 427 U.S. 463 (1976) (level of specificity required in the description of objects to be seized under a search warrant), with *Stanford v. Texas*, 379 U.S. 476 (1965) (level of specificity required when objects within ambit of first amendment).

• 252. *Zurcher*, 436 U.S. at 571.

253. Cf. *Stanford*, 379 U.S. at 476 (Court invalidated a warrant authorizing search of private home for all books, records, and other materials relating to the Communist Party; whether or not such a warrant would have been sufficient in other circumstances, in given situation it authorized the searchers to rummage among and make judgments about books and papers, thus amounting to functional equivalent of a general warrant, which is one of the principal targets of fourth amendment) (synopsized in *Zurcher*, 436 U.S. at 564).

voluntarily confides his *wrongdoing* will not reveal it,"²⁵⁴ and that "one contemplating *illegal* activities must realize and risk that his companions may be reporting to the police."²⁵⁵

Walter v. United States,²⁵⁶ the most recent of the Court's fourth amendment prior-restraint cases, further demonstrates the theorem that the shape of substantive fourth amendment rules is affected by the presence of first amendment values. *Walter* dealt with the question of whether a private search of allegedly obscene materials shielded the government's subsequent search from the operation of the fourth amendment.²⁵⁷ In holding that the fourth amendment applied to the government's opening of the film canisters and screening of the film therein, the Court extended the rule of "scrupulous exactitude" beyond the explicit language of the warrant clause. The *Walter* Court applied the rule of "scrupulous exactitude" to a judicially-determined principle of fourth amendment law: that a law-enforcement official's authority to possess a package which there is probable cause to believe contains contraband is separate and distinct from his or her authority to open that package without a warrant.²⁵⁸ If the rule of scrupulous exactitude applies to the Court's "container doctrine" when first amendment values are present, then perhaps that rule applies also to the doctrine of "legitimate expectations of privacy" where first amendment values such as that of private political dissent are at stake.

CONCLUSION

Government surveillance of domestic political organizations by informer has three dimensions. The first dimension, the political reality, is that the FBI guidelines promulgated by the executive branch of the government and acquiesced in by the legislature provide more protection for the speech, assembly, and privacy interests of members of the American public than does the applica-

254. *Hoffa*, 385 U.S. at 302 (emphasis added).

255. *White*, 401 U.S. at 752 (emphasis added).

256. 447 U.S. 649 (1980).

257. *Id.* at 652.

258. "When the contents of the package are books or other materials arguably protected by the First Amendment, and when the basis for the seizure is disapproval of the message contained therein, it is especially important that this requirement be scrupulously observed." *Id.* at 655 (footnote omitted).

ble constitutional law doctrine. The second dimension is that the existing constitutional law doctrine—the Court's informer cases—is inconsistent with modern fourth amendment analysis. The third dimension is that the Court has not yet been afforded the opportunity to consider the impact of first amendment values on its fourth amendment cases.

This Article has explored the second and third dimensions of the problem. With respect to the second dimension, the Article articulates a modern fourth amendment analysis which takes account of the movement of expectations-of-privacy analysis to a central position in the scope-of-coverage area. It posits two models of fourth amendment policy, each of which is suited to a different type of fact pattern, and proposes that one of these models, the public-interest model, is particularly suited to fact patterns involving government surveillance of domestic political organizations by informer. This model views the fourth amendment as a dynamic construct mediating between the collective need for protection of individual privacy and the need for effective government action for the maintenance of social order. Following this discussion, the Article surveys the old informer cases and demonstrates their deficiencies when analyzed in light of the public-interest model of modern fourth amendment law. The major deficiency of these cases is their unnecessary and inappropriate use of assumption-of-risk theory which, in effect, insulates the government conduct in question from constitutional scrutiny.

The third dimension of domestic political surveillance by informer involves the impact of first amendment values on underlying fourth amendment principles. This Article proposes that the rule of "scrupulous exactitude," developed in fourth and first amendment prior-restraint cases, be applied where political surveillance by informer is involved. Application of this rule to political surveillance could well create the result that an expectation of privacy as against a government undercover operation in the realm of political activity is reasonable and legitimate, whereas an analogous expectation against a government undercover operation in the realm of criminal activity is unreasonable and illegitimate.

The problem of government surveillance of domestic political groups is complex. Its successful resolution will require an appreciation of all of its dimensions—both political and legal. This Arti-

cle has demonstrated how the two major legal dimensions—that the Court's informer cases are inconsistent with its modern fourth amendment opinions, and that domestic political surveillance implicates first amendment values—may be approached so as to safeguard the interests of government and individual citizens alike.